

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

STATE OF OHIO,) Case No.2001-CR-794
)
Plaintiff)
)
-vs-) JUDGE JOHN M. STUARD
)
NATHANIEL E. JACKSON,)
) PARTIAL
Defendant) TRANSCRIPT OF PROCEEDINGS

VOLUME 14

NOVEMBER 4, 2002 - HEARING ON MOTIONS

NOVEMBER 5, 2002 - HEARING ON MOTIONS
THREE WITNESSES
HEARING ON MOTIONS - JURY INSTRUCTIONS

BEFORE: HONORABLE JOHN M. STUARD

AT: Trumbull Co. Court of Common Pleas
Courtroom Number 2
160 High Street, NW
Warren, Ohio 44481

APPEARANCES:

On behalf of the Plaintiff:
MESSRS. DENNIS WATKINS
and CHARLES L. MORROW
Attorneys at Law

On behalf of the Defendant:
MESSRES. JAMES F. LEWIS
and ANTHONY V. CONSOLDANE
Attorneys at Law

03-0137

FILED

JUL 09 2003

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Official Court Reporter: Kelly J. Wilson

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	(SEE SEPARATE VOLUME FOR TRANSCRIPT OF MITIGATION HEARING)	

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Exhibit No.	Description	Admitted
1	1911 Tape	Admitted over Obi
1A	1911 Paper work	No Objection
2	Crime Scene Video	Objection Sustained
3	Crime Scene Diagram	Admitted over Obi
4	Photo	No Objection
5	Photo	No Objection
6	Photo	Withdrawn
7	Photo	No Objection
8	Photo	No Objection
9	Photo	No Objection
10	Photo	No Objection
11	Photo	No Objection
12	Photo	No Objection
13	Photo	No Objection
14	Photo	No Objection
15	Photo	No Objection
16	Photo	No Objection
17	Photo	No Objection
18	Photo	No Objection
19	Photo	No Objection
20	Photo	No Objection
21	Photo	No Objection
22	Photo	Withdrawn
23	Photo	Withdrawn
24	Photo	No Objection
25	Photo	No Objection
26	Photo	No Objection
27	Photo	No Objection
28	Photo	No Objection
29	Photo	Withdrawn
30	Photo	Withdrawn
31	Photo	No Objection
32	Photo	Withdrawn
33	Photo	No Objection
34	Photo	No Objection
35	Photo	Withdrawn
36	Photo	Withdrawn
37	Photo	No Objection
38	Photo	No Objection
39	Photo	Withdrawn
40	Photo	No Objection
41	Photo	Withdrawn
42	Photo	Withdrawn
43	Photo	No Objection
44	Photo	No Objection
45	Photo	Withdrawn
46	Photo	Withdrawn
47	Photo	No Objection
48	Photo	No Objection
49	Photo	No Objection
50	Photo	Withdrawn
51	Photo	No Objection
52	Photo	No Objection
53	Photo	No Objection
54	Photo	No Objection
55	Photo	No Objection
56	Photo	No Objection
57	Photo	No Objection
58	Photo	No Objection
59	Photo	No Objection
60	Photo	No Objection

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61	Photo Shirt	No Objection
62	Photo Shirt	No Objection
63	Photo - Victim	Withdrawn
64	Bullet Recovered from Brain of Victim	No Objection
65	Bullet Recovered from Brain of Victim	No Objection
66	Clothes and Jewelry	No Objection
67	Photo X-Ray	No Objection
68	Photo Red's Jacket	No Objection
69	Tire Marks in Grass	No Objection
70	N. Side Exterior of House	No Objection
71	Front Exterior of House	No Objection
72	Rear Exterior of House	No Objection
73	S Side Exterior of House	No Objection
74	Main Bathroom	No Objection
75	View of man door screen from house	No Objection
76	View of man door screen from garage	No Objection
77	Spare Bedroom	No Objection
78	Clothing- Spare Bedroom	No Objection
79	Blood spatter - peninsula	Withdrawn
80	Blood Spatters- on wall by door	Withdrawn
81	Blood Spatters and smear	Withdrawn
82	Blood Spatters	Withdrawn
83	Inside Garage looking into residence	No Objection
84	Blood drops - garage	No Objection
85	Garage	Withdrawn
86	Blood Spatters - garage	No Objection
87	Overview garage	No Objection
88	Peninsula & Wall - blood splatters	Withdrawn
89	Different view as in 88	Withdrawn
90	Blood Drops in garage	No Objection
91	Kitchen door closed	No Objection
92	Overview garage	No Objection
93	Back of man door w/ blood	No Objection
94	Interior side of man door	No Objection
95	Eye glasses and broken lag bolt -garage	No Objection
96	Eye glasses - garage	No Objection
97	Stairwell ceiling	No Objection
98	receipt dated 9-26-01	No Objection
99	Victim	Withdrawn
100	Victim -back close up	Withdrawn
101	Small key found under victim	No Objection
102	overview bedroom	No Objection
103	bedroom master	No Objection
104	bedroom closet	No Objection
105	Photo	No Objection
105A	Photo	No Objection
106	Photo	No Objection
106A	Photo	No Objection
107	Photo	No Objection
107A	photo	No Objection
108	Victim	Withdrawn
108A	Victim Face down	Withdrawn
109	Dry Wall Hole	Withdrawn
109A	Victim face down	Withdrawn
110	Victim in Kitchen	No Objection
111	Victim lower torso	Withdrawn
112	Victim - Footprints w/ small dots	Withdrawn
113	Ashtray	No Objection
114	Ashtray	No Objection
115	Living Room	No Objection
116	Living Room	No Objection
117	Living Room	No Objection

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118	Office Area	No Objection
119	Office Area	No Objection
120	Office Area	No Objection
121	Office Area	No Objection
122	Front Door Looking In	No Objection
123	Dining Room - Orioles Jacket	No Objection
124	Office Area w/ ball cap	No Objection
125	Dry Wall Hole	No Objection
126	Front View of Car	No Objection
127	Left rear red car	No Objection
128	Left view red car	No Objection
129	Garage door & Driver door	No Objection
130	Family Room - overview	No Objection
131	Table w/ 2 roaches	No Objection
132	Garage w/ view of Gun	No Objection
133	Blood Drops in garage	Withdrawn
134	Overview - Office	No Objection
135	Kitchen - Door	Withdrawn
136	Open Door, Kitchen area	Withdrawn
137	Kitchen - receipt Walmart 9:33 p.m.	No Objection
138	Stainless Steel Revolver	No Objection
139	Close - up Footprint & Garage	No Objection
140	Stairwell & Basement	No Objection
141	Stairwell & Basement	No Objection
142	Cabinet	No Objection
143	Close - Up Cabinet	No Objection
144	Kitchen - Different View	No Objection
145	Pier One Import Bag w/ wine glasses	No Objection
146	Front View of Car	No Objection
147	Rt Side View of Car	No Objection
148	Rear view of Car	No Objection
149	Left Side view of Car	No Objection
150	Double Lined Bag "Nate Jackson"	No Objection
151	Receipt - Pier One Import - Lorain Rd	No Objection
152	Assorted Candy, toothpaste	No Objection
153	Customer Receipt	No Objection
154	Handcuff Box w/ key - no cuffs	No Objection
155	Hair Comb	No Objection
156	Front View of Car	No Objection
157	Rear view of Car	No Objection
158	Wide Angle Rear of Car	Withdrawn
159	Rt Side View of Car	No Objection
160	Front View of Car - Left Corner	No Objection
161	Rear view of Car - Damage to Bumper	Withdrawn
162	Front View of Car	No Objection
163	Exterior to Interior - Blood Smears	No Objection
164	Visor Area	No Objection
165	Interior area above head w/ blood	No Objection
166	Exterior	No Objection
167	Front Driver Seat	Withdrawn
168	Visor Area - Removed	No Objection
169	Door Handle	No Objection
170	Door Handle w/ blood	No Objection
171	Driver side visor clamp	No Objection
172	Front Passenger Seat - Cell Phone	No Objection
173	Front Passenger Seat - Cell Phone	No Objection
174	Interior - Left Console	No Objection
175	Napkin w/ Blood Smear	No Objection
176	Floormat	Withdrawn
177	Trunk Open	No Objection
178	Keys in Ignition	No Objection
179	Rt interior head rest	Withdrawn

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180	Driver Side Console	No Objection
181	Passenger Side Dashboard	No Objection
182	Passenger side door - interior	No Objection
183	Driver side - steering wheel p garage door opener	No Objection
184	Left side of car w/ dashboard	No Objection
185	Rt side back seat	No Objection
186	Front driver compartment	No Objection
187	Exterior thru rear left door	No Objection
188	keys	Withdrawn
189	Cell Phone	Withdrawn
190	Keys - Blue Matt	Withdrawn
191	Driver side - release button	No Objection
192	Wagon Wheel Photo	Objection Sustained
193	Wagon Wheel Photo	Objection Sustained
194	Wagon Wheel Photo	Admitted over Obj
195	Wagon Wheel Photo	Admitted over Obj
196	Wagon Wheel Photo	Objection Sustained
197	Photograph Items Recovered Days Inn	Admitted over Obj
198	No Exhibit	
199	Days Inn Photographs	Withdrawn
200	Days Inn Photographs	Withdrawn
201	Days Inn Photographs	Admitted over Obj
202	Days Inn Photographs	Objection Sustained
203	Days Inn Photographs	Withdrawn
204	Days Inn Photographs	Objection Sustained
205	Days Inn Photographs	Withdrawn
206	Days Inn Photographs	Withdrawn
207	Days Inn Photographs	Withdrawn
208	Days Inn Photographs	Withdrawn
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213	Days Inn Photographs	Withdrawn
214	Days Inn Photographs	Withdrawn
215	Days Inn Photographs	Withdrawn
216	Days Inn Photographs	Withdrawn
217	Days Inn Photographs	Withdrawn
218	Days Inn Photographs	Withdrawn
219	Days Inn Photographs	Withdrawn
220	Days Inn Photographs	Withdrawn
221	Days Inn Photographs	Withdrawn
222	Days Inn Photographs	Withdrawn
223	Days Inn Photographs	Withdrawn
224	Days Inn Photographs	Admitted over Obj
225	Days Inn Photographs	Withdrawn
226	Days Inn Photographs	Admitted over Obj
227	Photographs of Wirt Street	Admitted over Obj
228	Photographs of Wirt Street	Out
229	Photographs of Wirt Street	Out
230	Photographs of Wirt Street	Admitted over Obj
231	Photographs of Wirt Street	Admitted over Obj
232	Photographs of Wirt Street	Out
233	Wirt Street Photographs	Out
234	Wirt Street Photographs	Admitted over Obj
235	Front view - Nate Jackson	No Objection
236	Rear view Nate Jackson	No Objection
237	Full body shot	No Objection
238	Rt arm and Hand	No Objection
239	Front view - Nate Jackson	No Objection
240	Left & Rt knee	No Objection
241	View of Hands & Wound	No Objection

271D	Letters From Donna to Nate		
271D1		12/03/01	Admitted
271D2		11/29/01	Admitted
271D3		11/29/01	Admitted
271D4		11/28/01	Admitted
271D5		11/28/01	Admitted
271D6		11/27/01	Admitted
271D7		11/27/01	Admitted
271D8		11/26/01	Admitted
271D9		11/26/01	Admitted
271D10		11/24/01	Admitted
271D11		11/23/01	Admitted
271D12		11/23/01	Admitted
271D13		11/22/01	Admitted
271D14		11/22/01	Admitted
271D15		11/22/01	Admitted
271D16		11/22/01	Admitted
271D17		11/21/01	Admitted
271D18		11/21/01	Admitted
271D19		11/20/01	Admitted
271D20		11/20/01	Admitted
271D21		11/20/01	Admitted
271D22		11/20/01	Admitted
271D23		11/19/01	Admitted
271D24		11/19/01	Admitted
271D25		11/19/01	Admitted
271D26	Empty		Admitted
271D27		11/16/01	Admitted
271D28		11/16/01	Admitted
271D29		11/15/01	Admitted
271D30	Empty		Admitted
271D31		11/12/01	Admitted
271D32		11/10/01	Admitted
271D33		11/10/01	Admitted
271D34		11/10/01	Admitted
271D35		11/10/01	Admitted
271D36		11/09/01	Admitted
271D37		11/09/01	Admitted
271D38		11/09/01	Admitted
271D39		11/09/01	Admitted
271D40		11/08/01	Admitted
271D41		11/08/01	Admitted
271D42		11/08/01	Admitted
271D43		11/07/01	Admitted
271D44		11/07/01	Admitted
271D45		11/07/01	Admitted
271D46		11/07/01	Admitted
271D47	Empty		Admitted
271D48		11/06/01	Admitted
271D49		11/06/01	Admitted
271D50	Empty		Admitted
271D51		11/05/01	Admitted
271D52		11/05/01	Admitted
271D53		11/03/01	Admitted
271D54		11/03/01	Admitted
271D55		11/02/01	Admitted
271D56		11/02/01	Admitted
271D57		11/02/01	Admitted
271D58		11/01/01	Admitted
271D59		11/01/01	Admitted
271D60	Halloween card		Admitted
271D61		10/31/01	Admitted

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271D124	10/05/01	271D62	10/30/01	Admitted
271D125	10/29/01	271D63	10/29/01	Admitted
271D126	10/29/01	271D64	10/29/01	Admitted
271D127	10/28/01	271D65	10/28/01	Admitted
271D128	10/27/01	271D66	10/27/01	Admitted
271D129	10/26/01	271D67	10/26/01	Admitted
271D130	10/26/01	271D68	10/26/01	Admitted
271D131	10/26/01	271D69	10/26/01	Admitted
271D132 Unknown	10/25/01	271D70	10/25/01	Admitted
	10/25/01	271D71	10/25/01	Admitted
	10/24/01	271D72	10/24/01	Admitted
	10/24/01	271D73	10/24/01	Admitted
	10/23/01	271D74	10/23/01	Admitted
	10/23/01	271D75	10/23/01	Admitted
	10/23/01	271D76	10/23/01	Admitted
	10/23/01	271D77	10/23/01	Admitted
	10/22/01	271D78	10/22/01	Admitted
		271D79 Empty		Admitted
	10/21/01	271D80	10/21/01	Admitted
	10/20/01	271D81	10/20/01	Admitted
	10/20/01	271D82	10/20/01	Admitted
	10/20/01	271D83	10/20/01	Admitted
	10/20/01	271D84	10/20/01	Admitted
	10/19/01	271D85	10/19/01	Admitted
	10/19/01	271D86	10/19/01	Admitted
	10/19/01	271D87	10/19/01	Admitted
	10/19/01	271D88	10/19/01	Admitted
	10/18/01	271D89	10/18/01	Admitted
		271D90 Empty		Admitted
	10/18/01	271D91	10/18/01	Admitted
	10/17/01	271D92	10/17/01	Admitted
	10/16/01	271D93	10/16/01	Admitted
	10/16/01	271D94	10/16/01	Admitted
	10/15/01	271D95	10/15/01	Admitted
	10/15/01	271D96	10/15/01	Admitted
	10/15/01	271D97	10/15/01	Admitted
	10/13/01	271D98	10/13/01	Admitted
	10/13/01	271D99	10/13/01	Admitted
	10/13/01	271D100	10/13/01	Admitted
	10/12/01	271D101	10/12/01	Admitted
	10/12/01	271D102	10/12/01	Admitted
	10/12/01	271D103	10/12/01	Admitted
		271D104 Empty		Admitted
	10/12/01	271D105	10/12/01	Admitted
	10/12/01	271D106	10/12/01	Admitted
	10/11/01	271D107	10/11/01	Admitted
	10/11/01	271D108	10/11/01	Admitted
	10/11/01	271D109	10/11/01	Admitted
	10/10/01	271D110	10/10/01	Admitted
	10/10/01	271D111	10/10/01	Admitted
	10/10/01	271D112	10/10/01	Admitted
	10/08/01	271D113	10/08/01	Admitted
	10/08/01	271D114	10/08/01	Admitted
	10/06/01	271D115	10/06/01	Admitted
	10/06/01	271D116	10/06/01	Admitted
	10/06/01	271D117	10/06/01	Admitted
	10/05/01	271D118	10/05/01	Admitted
	10/05/01	271D119	10/05/01	Admitted
	10/05/01	271D120	10/05/01	Admitted
	10/05/01	271D121	10/05/01	Admitted
	10/05/01	271D122	10/05/01	Admitted
	10/05/01	271D123	10/05/01	Admitted

xii

271D124	2007	10/05/01	Admitted
271D125		10/04/01	Admitted
271D126		10/04/01	Admitted
271D127		10/02/01	Admitted
271D128		10/02/01	Admitted
271D129		10/02/01	Admitted
271D130	Unknown		Admitted
271D131	Unknown		Admitted
271D132	Unknown		Admitted
271D133	Unknown		Admitted
271D134	Unknown		Admitted
271D135	Unknown		Admitted
271D136	Unknown		Admitted
271D137	Unknown		Admitted
271D138	Unknown		Admitted
271D139		11/26/01	Admitted

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xiv

273N	Letters from Nate to Donna	Admitted
273N1	12/01/01	Admitted
273N2	11/30/01	Admitted
273N3	11/29/01	Admitted
273N4	11/28/01	Admitted
273N5	11/27/01	Admitted
273N6	11/26/01	Admitted
273N7	11/25/01	Admitted
273N8	11/23/01	Admitted
273N9	11/22/01	Admitted
273N10	11/20/01	Admitted
273N11	11/19/01	Admitted
273N12	11/17/01	Admitted
273N13	11/16/01	Admitted
273N14	11/14/01	Admitted
273N15	11/14/01	Admitted
273N16	11/13/01	Admitted
273N17	11/12/01	Admitted
273N18	11/12/01	Admitted
273N19	11/10/01	Admitted
273N20	11/09/01	Admitted
273N21	11/07/01	Admitted
273N22	11/06/01	Admitted
273N23	11/08/01	Admitted
273N24	11/05/01	Admitted
273N25	11/03/01	Admitted
273N26	11/01/01	Admitted
273N27	11/01/01	Admitted
273N28	10/31/01	Admitted
273N29	10/30/01	Admitted
273N30	273N31	273N32
273N31	10/28/01	Admitted
273N32	10/27/01	Admitted
273N33	273N34	273N35
273N34	10/25/01	Admitted
273N35	10/25/01	Admitted
273N36	10/25/01	Admitted
273N37	10/24/01	Admitted
273N38	10/23/01	Admitted
273N39	10/22/01	Admitted
273N40	10/21/01	Admitted
273N41	10/21/01	Admitted
273N42	10/20/01	Admitted
273N43	10/19/01	Admitted
273N44	10/18/01	Admitted
273N45	10/17/01	Admitted
273N46	10/16/01	Admitted
273N47	10/16/01	Admitted
273N48	10/15/01	Admitted
273N49	10/14/01	Admitted
273N50	10/12/01	Admitted
273N51	10/10/01	Admitted
273N52	10/10/01	Admitted
273N53	10/08/01	Admitted
273N54	10/05/01	Admitted
273N55	10/07/01	Admitted
273N56	10/04/01	Admitted
273N57	10/04/01	Admitted
273N58	10/02/01	Admitted
273N59	10/01/01	Admitted
273N60	10/01/01	Admitted
273N61	09/30/01	Admitted

XV

273N62		09/27/01	Admitted
273N63		09/27/01	Admitted
273N64		07/12/01	Admitted
273N65		06/28/01	Admitted
273N66		06/09/01	Admitted
273N67		05/18/01	Admitted
273N68		05/15/01	Admitted
273N69		05/12/01	Admitted
273N70		05/10/01	Admitted
273N71		05/09/01	Admitted
273N72		05/06/01	Admitted
273N73		05/04/01	Admitted
273N74		05/03/01	Admitted
273N75		04/28/01	Admitted
273N76		02/24/01	Admitted
273N77		04/23/01	Admitted
273N78		04/22/01	Admitted
273N79		04/19/01	Admitted
273N80		04/16/01	Admitted
273N81		04/16/01	Admitted
273N82		04/15/01	Admitted
273N83		04/11/02	Admitted
273N84		04/10/01	Admitted
273N85		04/10/01	Admitted
273N86		04/09/01	Admitted
273N87		04/08/01	Admitted
273N88		04/04/01	Admitted
273N89		04/02/01	Admitted
273N90	Unknown		Admitted
273N91		03/31/01	Admitted
273N92		03/29/01	Admitted
273N93		03/26/01	Admitted
273N94		03/25/01	Admitted
273N95		03/23/01	Admitted
273N96		03/22/01	Admitted
273N97		03/20/01	Admitted
273N98		03/20/01	Admitted
273N99		03/20/01	Admitted
273N100		03/19/01	Admitted
273N101		03/19/01	Admitted
273N102		03/19/01	Admitted
273N103		03/19/01	Admitted
273N104		03/15/01	Admitted
273N105		03/13/01	Admitted
273N106		03/12/01	Admitted
273N107		03/11/01	Admitted
273N108		03/09/01	Admitted
273N109		03/06/01	Admitted
273N110		03/04/01	Admitted
273N111		03/03/01	Admitted
273N112		03/02/01	Admitted
273N113		02/27/01	Admitted
273N114		02/25/01	Admitted
273N115		02/20/01	Admitted
273N116		02/23/01	Admitted
273N117		02/22/01	Admitted
273N118		02/19/01	Admitted
273N119		02/16/01	Admitted
273N120		02/15/01	Admitted
273N121	Unknown		Admitted
273N122		02/13/01	Admitted
273N123		02/12/01	Admitted

1 - WOUND

273N124	02/09/01	Admitted
273N125	02/07/01	Admitted
273N126	02/04/01	Admitted
273N127	02/01/01	Admitted
273N128	02/01/01	Admitted
273N129	01/26/01	Admitted
273N130	01/19/01	Admitted
273N131	01/17/01	Admitted
273N132	01/21/01	Admitted
273N133	01/16/01	Admitted
273N134	01/12/01	Admitted
273N135	01/05/01	Admitted
273N136	01/01/01	Admitted
273N137	12/27/00	Admitted
273N138	12/27/00	Admitted
273N139	Unknown	Admitted
273N140	12/11/00	Admitted
273N141	Unknown	Admitted
273N142	Unknown	Admitted
273N143	05/01/01	Admitted

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242	Left Hand - Wound	No Objection
243	Front view w/ bandage	No Objection
244	Side view Finger	No Objection
245	Left Hand - wrist to finger tip	No Objection
246	Left Hand Palm up	No Objection
247	Back side of Hand	No Objection
248	Both Hands	No Objection
249	Head and Shoulders	Admitted over Obj
250	Full body shot	Objection Sustained
251	Handgun - .38 Taurus	No Objection
252	Five (5) Live Rounds from Taurus	No Objection
252A	Envelope Containing Test Fire Rounds	No Objection
253	Right Eye glass Lens	No Objection
254	Eye glasses Missing Right Lens	No Objection
255	Cotton Swab - Front Door Hallway	No Objection
256	Dry Wall Cut out w/ Bullet Hole	No Objection
257	Bullet Recovered from Dry Wall	No Objection
258	Cincinnati Red's Jacket - From Victim	No Objection
259	Bullet Recovered from Clothing of Victim	No Objection
260	Death Certificate	No Objection
261	Coroner's Verdict	No Objection
262	Autopsy Protocol - 11 pages	No Objection
263	Microscopic Examination	No Objection
264	Toxicology - 1 page Front and Back	No Objection
264A	Radiology Report	No Objection
265	Blood - Drawn from Robert Fingerhut	No Objection
266	Bullet Recovered from Brain of Victim	No Objection
267	Driver's Side Visor	No Objection
268	Visor Clamp	No Objection
269	Keys Recovered from Ignition	No Objection
270	Bag Containing Letters	No Objection
271	Letters from Donna to Nate (See attached)	No Objection
272	No Exhibit	
273	Letters from Nate to Donna (See Attached)	No Objection
274	No Exhibit	
275A	Hand Writing Analysis	Admitted over Obj
275B	Hand Writing Analysis	Admitted over Obj
276A	Hand Writing Standard	No Objection
276B	Hand Writing Standard	No Objection
276b1	CCA Records	No Objection
276B2	CCA Records	No Objection
276B3	CCA Records	No Objection
276B4	CCA Records	No Objection
276B5	CCA Records	No Objection
276B6	CCA Records	No Objection
276B7	CCA Records	No Objection
276C	Hand Writing Standard	No Objection
276C1	Prison Records	No Objection
276C2	Prison Records	No Objection
276C3	Prison Records	No Objection
276C4	Prison Records	No Objection
277	01-35755- Two (2) pages	No Objection
278	01-35755-A	No Objection
279	01-35755-B	No Objection
280	01-35755-C	No Objection
281	01-35755-D	Admitted over Obj
282A	01-35755 - Mike Roberts (2) Pages	No Objection
282B		Not Introduced
282C	01-35755 - Mike Roberts Supplemental	No Objection
283	01-35755 - Cindy Maylee (2) Pages	No Objection
284	Dale Laux - (2) Pages	No Objection
285	Steve Green (1) Page	Admitted over Obj

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286A	Brenda Gerardi (3) Pages	No Objection
286B		Not Introduced
286C	Brenda Gerardi Supplemental 1 Corrected (2) Pages	No Objection
286D	Brenda Gerardi Supplemental 2 - (3) Pages	No Objection
287	Plastic Bag With Three (3) Boxes of Swabs	Withdrawn
287A	Box Containing Blood Swab - Days Inn	Withdrawn
287B	Box Containing Blood Swab - Days Inn	Withdrawn
287C	Box Containing Blood Stain - Days Inn	Withdrawn
288	Wash Cloth - Days Inn - Days Inn	Withdrawn
289	Hand Towel - Days Inn	Withdrawn
290	Tape Lifts - Hairs Toilet	Withdrawn
291	Finger Print Cards - Jennifer Robinson	Withdrawn
292	White Stain Napkins from Dumpster	Withdrawn
293	Dish Cloth - From Dumpster	Withdrawn
294	Dressing from Dumpster	No Objection
295	Dressing from Dumpster	Withdrawn
296	Dressing and Tape from Dumpster	Withdrawn
297	White Stain Napkins	Withdrawn
298	Stained White Wash Cloth	Withdrawn
299	One (1) Condom	Withdrawn
300	One (1) Condom	Withdrawn
301	Hydrogen Peroxide Bottle	Withdrawn
302	Empty Package for Bandage	Withdrawn
303	Empty First Aid Tape Box	Withdrawn
304	Empty Bandage Roll	Withdrawn
305	Empty First Aid Sponge Package	Withdrawn
306	Empty First Aid Sponge Package	Withdrawn
307	Empty First Aid Sponge Package	Withdrawn
308	Empty First Aid Sponge Package	Withdrawn
309	Empty Days Inn Room Key Card Enevelope #29	No Objection
310	Empty Days Inn Room Key Card Enevelope #138 w/ To	Withdrawn
311	Envelope Containing Receipts	Admitted over Obj
311A	Check Inn	Admitted over Obj
311B	Credit Card Receipt	Admitted over Obj
311C	Register Audit	Admitted over Obj
311D	Phone Log	Admitted over Obj
311E	Credit Card Receipt	Admitted over Obj
312	Check Inn	No Objection
313	Photographic Line -Up Jose Flores	No Objection
314	Evevelope Continaing Guest Log (5) pages	No Objection
314A	Guest Log	No Objection
314B	Guest Log	No Objection
314C	Guest Log	No Objection
314D	Guest Log	No Objection
314E	Final Bill	No Objection
315	Guest Check	No Objection
316	Photographic Line - Up Jill Kenyon	No Objection
317	Black Gloves	No Objection
318	Black & Red Nike Tennis Shoes	No Objection
319	Composite Video Tape	Admitted over Obj
320	Enevelope Continaing 9 Photos	Admitted over Obj
320A	4 X 5 Black and WHite Photo	Objection Sustained
320B	4 X 5 Black and White Photo	Objection Sustained
320C	4 X 5 Color Phot	Objection Sustained
320D	4 X 5 Color Photo	Admitted over Obj
320E	8 1/2 X 11 Photo	Withdrawn
320F	8 1/2 X 11 Photo	Withdrawn
320G	8 1/2 X 11 Photo	Withdrawn
320H	8 1/2 X 11 Photo	Withdrawn
320I	8 1/2 X 11 Photo	Admitted over Obj
321	Dobson Communication Phone Records 17 pages	Admitted over Obj
322	\$250,000 - ZurichLife Insurance Policy 24 pages	Admitted over Obj

323	\$300,000 - State Farm Insurance Policy 17 pages	Admitted over Obi
324	Constitutional Rights Waiver	No Objection
325	Video Tape Confession	No Objection
326	Transcript of Video Tape Confession 38 Pages	No Objection
327A	Certification - ATF - 1 page	Admitted over Obi
327B	Taurus IL46854 - 2 pages	Admitted over Obi
327C	Taurus JH14188 - 1 page	Admitted over Obi
360	Cd containing 19 Telephone Conversations	No Objection
361	Telephone Log Record 3 pages	No Objection
362	Audio Tape of 10-05-01 Recording	No Objection
362A	Transcript of 10-05-01 Recording	No Objection
363	Audio Tape of 10-25-01 Recording	No Objection
363A	Transcript of 10-25-01 Recording	No Objection
364	Audio Tape of 10-27-01 Recording	No Objection
364A	Transcript of 10-27-01 Recording	No Objection
365	Audio Tape of 11-03-01 Recording	No Objection
365A	Transcript of 11-03-01 Recording	No Objection
366	Audio Tape of 11-08-01 Recording	No Objection
366A	Transcript of 11-08-01 Recording	No Objection
367	Audio Tape of 11-10-01 Recording	No Objection
367A	Transcript of 11-10-01 Recording	No Objection
368	Audio Tape of 11-11-01 Recording	No Objection
368A	Transcript of 11-11-01 Recording	No Objection
369	Audio Tape of 11-15-01 Recording	No Objection
369A	Transcript of 11-15-01 Recording	No Objection
370	Audio Tape of 11-17-01 Recording	No Objection
370A	Transcript of 11-17-01 Recording	No Objection
371	Audio Tape of 11-22-01 Recording	No Objection
371A	Transcript of 11-22-01 Recording	No Objection
372	Audio Tape of 11-24-01 Recording	No Objection
372A	Transcript of 11-24-01 Recording	No Objection
373	Audio Tape of 11-24-01 Recording	No Objection
373A	Transcript of 11-24-01 Recording	No Objection
374	Audio Tape of 11-25-01 Recording	No Objection
374A	Transcript of 11-25-01 Recording	No Objection
375	Audio Tape of 11-29-01 Recording	No Objection
375A	Transcript of 11-29-01 Recording	No Objection
376	Audio Tape of 12-01-01 Recording	No Objection
376A	Transcript of 12-01-01 Recording	No Objection
377	Audio Tape of 12-02-01 Recording	No Objection
377A	Transcript of 12-02-01 Recording	No Objection
379	Audio Tape of 12-06-01 Recording	No Objection
379A	Transcript of 12-06-01 Recording	No Objection
380	Audio Tape of 12-08-01 Recording	No Objection
380A	Transcript of 12-08-01 Recording	No Objection
381	Audio Tape of 12-08-01 Recording	No Objection
381A	Transcript of 12-08-01 Recording	No Objection
349	Photographic Line-Up - Frank Reynolds	Not Introduced
350	Consent to Search - Wirt Street - Shelia Fields	No Objection
351	(2) two cotton tipped swabs	No Objection
352	Search Warrant for Oral Swabs and Photographs	Withdrawn
385	Swabs	No Objection
386	Swabs	No Objection
387	Swabs	No Objection
388	Swabs	No Objection
389	Swabs	No Objection
390	Gerardi - Cutting	No Objection
391	Envelope Containing Jackson Prints	No Objection
391A	Jackson Prints	No Objection
392	Photograph - Lifts	No Objection
393	Photograph - Lifts	No Objection
394	Envelope Containing 2 Photos	No Objection

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395	Envelope Containing Lift Sheets	No Objection
395A	Lift Sheets	No Objection
395B	Lift Sheets	No Objection
396	Walmart Receipt	Admitted over Obj
397	Audio Tape of Excerpts	Objection Sustained
397A	Transcript of Audio Tape Excerpts	Objection Sustained
398	Preston Automobile Service Records Red Chrysler	Admitted over Obj
398 A-P	Preston Automobile Service Records Red Chrysler	Admitted over Obj
399	Preston Automobile Service Records Silver Chrysler	Admitted over Obj
399 A-J	Preston Automobile Service Records Silver Chrysler	Admitted over Obj
400	Trumbull County Recorder 494 Olive Street	Admitted over Obj
400 A-C	Trumbull County Recorder 494 Olive Street	Admitted over Obj
401	Trumbull County Recorder Washington Street	Admitted over Obj
401 A-D	Trumbull County Recorder Washington Street	Admitted over Obj
402	Trumbull County Recorder - Fonderlac	Admitted over Obj
402 A-F	Trumbull County Recorder - Fonderlac	Admitted over Obj
403A-403RR	Defendant's school records	No Objection
Defendant's Exhibits		
Deft A	Deft.'s Criminal History	No Objection
Deft B	Contains 9 subparts of Blood Swabs	No Objection
Deft F	Credit Application	No Objection
Deft G	BMV Registration Card	No Objection
Deft H	Sales Agreement	No Objection
Deft I	Lease Agreement	No Objection
Deft J	Car Registration	No Objection
Deft K	Credit Application	No Objection
Deft L	BMV Registration Card	No Objection
Deft M	Real Estate Records	No Objection
Deft N	Real Estate Records	No Objection
Deft O	Real Estate Records	No Objection
Deft P	Psychological Report	No Objection
Joint 1	Fingerhut Jewelry	No Objection
Court Exhibit 1 Orientation Instructions		
Court Exhibit 2 Exhibit List		
Court Exhibit 3 Brief In Opposition to Acquittal		
Court Exhibit 4 Jury Charge		
Court Exhibit 5 Corrected Instruction		
Court Exhibit 6 Jury Question		
Court Exhibit 7 Penalty Instruction		

1 (November 4, 2002 - 1:23 p.m.)

2 (Whereupon, the following proceedings
3 occurred outside the presence of the jury.)

4 THE COURT: For the record, it is my
5 understanding, correct me if I'm wrong, that the State has
6 rested presentation of evidence at this point.

7 MR. WATKINS: Yes, Your Honor.

8 THE COURT: Okay.

9 MR. WATKINS: Move for the admission, and
10 we have moved for admission of our exhibits which the Court
11 has, I believe, ruled on.

12 THE COURT: Right. That appears as a
13 matter of record as to what exhibits have been mutually
14 agreed to and which ones the Court has excluded or included,
15 and we spent quite a bit of time in going over that so there
16 should be no problem about what evidence will go to the jury.
17 The question is does the State or the defense wish to proceed
18 with anything?

19 MR. CONSOLDANE: Your Honor, the defense
20 at this time has presented its witnesses and is also going to
21 rest, and we're requesting that our exhibits be admitted. I
22 think that the Court has already ruled on those, and the ones
23 that we weren't in agreement on. Is that correct or not?

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1 Did we already work that out?

2 MR. WATKINS: I think, but we haven't
3 looked at them.

4 MR. MORROW: No. O through -- or F
5 through O we weren't going to raise objections to those.
6 Those were --

7 MR. WATKINS: That was one --

8 MR. LEWIS: Those were all the records.

9 MR. WATKINS: We withdraw our motion on
10 relevance and we would like to inspect before I would make --
11 I didn't look at all of the documents so.

12 THE COURT: I thought we had covered them
13 but that's okay. Okay. For the record, one thing for the
14 record, there was a proffer of evidence by agreement.
15 Defense presented some witnesses that were really out of turn
16 at the point because the prosecution had not technically
17 rested. It's a matter of convenience, everybody's agreement.
18 Those witnesses were put on, their testimony was taken, and
19 you're moving for the introduction of any exhibits. It's my
20 understanding now that those will be admitted subject to the
21 State's right before we go to the final arguments to review
22 and to have the Court revisit if necessary.

23 MR. WATKINS: And present possible

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1 rebuttal witnesses.

2 MR. CONSOLDANE: All right. Your Honor,
3 we are also -- I we also would like the opportunity to, before
4 it goes to final arguments, to review the State's exhibits
5 and present any other objections that we may have.

6 THE COURT: Well, you mean anything that
7 comes in from this point on?

8 MR. CONSOLDANE: No. We have some, we
9 have an objection to -- we made some objections to some of
10 their exhibits and we would like to possibly revisit one or
11 two of those.

12 THE COURT: I understood --

13 MR. CONSOLDANE: I mean, they just made
14 the same argument and request that you granted them, to check
15 over our exhibits before they're admitted, and I just want
16 the same courtesy.

17 MR. WATKINS: Your Honor, I think we
18 should take things as they should come in order. Right now
19 we are dealing with the State resting.

20 THE COURT: That would surely be the most
21 or the proper way to do it. We have to get -- Mary Ann is
22 taking a trial down there. We need those exhibits, Kelly.
23 You got them back there? Well, maybe we can get them. You

1 have a key for that?

2 MR. MORROW: I'll get it, Your Honor.

3 MR. WATKINS: I don't, I don't understand.

4 What are we doing now?

5 MR. LEWIS: We're going to do the
6 defendant's exhibits.

7 THE COURT: We're going to go over the
8 defendant's exhibits so you can object to anything right now.
9 What they're saying is if you're going to reserve that right
10 they're going to reserve the right.

11 MR. WATKINS: Well.

12 THE COURT: I think we already are past
13 that point but --

14 MR. WATKINS: Yeah. I thought that we've
15 already ruled on exhibits that the State had.

16 THE COURT: I thought I ruled on all of
17 them, including the defense.

18 MR. WATKINS: That's what the record
19 reflects.

20 MR. CONSOLDANE: I mean, if you're going
21 to reserve arguing about our exhibits, we want to reserve
22 arguing about your exhibits.

23 THE COURT: Let's just get them. There

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1 aren't that many. We'll go through them.

2 MR. WATKINS: Yeah, but we're dealing with

3 two different things. We're dealing with the State's direct

4 case and we're dealing with your rebuttal case.

5 THE COURT: No.

6 MR. LEWIS: It's not rebuttal.

7 MR. WATKINS: Oh, I have no objection to

8 --oh, to their evidence? Okay.

9 THE COURT: Their exhibits introduced in

10 their evidence in chief.

11 MR. LEWIS: Right.

12 MR. WATKINS: Okay. Okay. You're right.

13 MR. MORROW: Teeple is on his way over

14 with the key.

15 THE COURT: Okay. Let's keep the record

16 straight now. Chuck, do you recall, I thought we went over

17 the defendant's exhibits.

18 MR. WATKINS: Yeah. I haven't looked at

19 them, judge, and that's why. We just want to inspect them.

20 MR. MORROW: Jim Teeple is bringing the

21 key, Your Honor, so we can get into the room.

22 THE COURT: I got a key to get in there.

23 Do you want a key to get in?

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1 MR. WATKINS: I just want to look at them.
2 It will take me five minutes to look at them.

3 SHERIFF DEPUTY: Laurie has a key.

4 MR. MORROW: No, Laurie gave that key to
5 Jim Teeple. I guess he is on his way over.

6 (Whereupon, a brief recess was taken.)

7 THE COURT: Kelly, for the record, I think
8 we probably need not have it, but we're doing this in open
9 court. None of the jury, of course, is here.

10 (Whereupon, a brief recess was taken.)

11 MR. WATKINS: I think we are ready, Your
12 Honor.

13 THE COURT: Are you ready?

14 MR. WATKINS: We don't have any objections
15 to their exhibits.

16 THE COURT: Okay. Defendant's Exhibits
17 which are designated what specifically, Mr. Consoldane?

18 MR. CONSOLDANE: I believe it's A through
19 F? No. There's -- no, there's more than that.

20 THE COURT: Just read them out.

21 MR. CONSOLDANE: F, G, H, I, J, K. I
22 don't see L. M, N, O, P.

23 MR. MORROW: L is probably attached to the

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1 back one of those.

2 MR. CONSOLDANE: Okay. Now this I can't

3 -- I don't know what this is. This is A.

4 MR. MORROW: That's B.

5 MR. CONSOLDANE: Is this B?

6 MR. MORROW: B.

7 THE COURT: Okay.

8 MR. CONSOLDANE: I don't know where C, D,

9 E or L is.

10 MR. WATKINS: Because we didn't know,

11 that's why we just picked a number.

12 THE COURT: They weren't -- there was

13 nothing marked with those numbers.

14 MR. MORROW: We just started with F, we

15 didn't have C, D and E, and L is attached to the back of one

16 of those I'm sure, Tony. If you take the one with the paper

17 clip on it, L is behind it.

18 MR. CONSOLDANE: All right. This one

19 here?

20 MR. MORROW: I think so.

21 MR. CONSOLDANE: You say L is attached to

22 that?

23 MR. MORROW: It might be paper clipped

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1 together.

2 MR. CONSOLDANE: Yeah, okay. Yes, it is.

3 All right.

4 THE COURT: Is that clear enough for the
5 record then?

6 MR. MORROW: A, B and F through O.

7 THE COURT: A, B and --

8 MR. MORROW: F through O.

9 THE COURT: Okay. Those will be admitted,
10 become part of the evidence that goes to the jury then.

11 MR. CONSOLDANE: With the admittance of
12 our evidence, then the defense rests also, Your Honor.

13 THE COURT: Approach.

14 (Whereupon, a bench conference was held.)

15 MR. CONSOLDANE: Your Honor, this has been
16 disjointed and I was going to make a motion to dismiss, but
17 the State has already indicated they're going to call more
18 witnesses and now they said that they have rested and they're
19 going to call them as rebuttal. But we do have several
20 motions --

21 THE COURT: Okay. Make your motion then.

22 MR. CONSOLDANE: -- to make and I don't

23 know whether we should make them now or after they make their

1 rebuttal case, but if you wish I'll make them now. Okay.

2 Your Honor, first of all, we believe that all the charges,

3 including the two murder counts and the aggravated robbery

4 and aggravated burglary, ought to be dismissed being that the

5 State has not proved each and every element of the offense

6 beyond a reasonable doubt.

7 THE COURT: Do you wish to be more

8 specific than that?

9 MR. CONSOLDANE: Well, not for the general

10 motion, Your Honor. I'm going to tack on each one of them,

11 there's other things that I want to go over, but that's just

12 a general motion that I want to make at this time.

13 MR. WATKINS: Do you want me to respond to

14 that, Your Honor?

15 THE COURT: Yeah. Let me get one book

16 first. Does the State wish to give your side of the

17 argument?

18 MR. WATKINS: Your Honor, there is

19 sufficient evidence that a jury could reasonably find that

20 the defendant committed every charge as contained in the

21 indictment when considering all of the 29 witnesses and the

22 many exhibits that have been admitted.

23 MR. CONSOLDANE: Your Honor, then I would

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1 like to specifically then go, at this time go through each of
2 the charges that we've had. As far as the murder cases, they
3 have chose to charge him with two counts of aggravated murder
4 although be it there's only been one person that's deceased
5 at this time. I think that they had the right to charge him
6 but before, before trial they should have had to make an
7 election as to which one they are going to proceed on and
8 which one that they can prove.

9 At this point certainly they have rested, they know
10 what their evidence is, and I believe that to have two counts
11 of murder go to the jury is highly prejudicial upon Mr.
12 Jackson and that they should either have to indicate whether
13 this murder was planned, was premeditated and committed with
14 prior calculation and design, or whether this was a homicide
15 that occurred during either attempt of an aggravated burglary
16 or because of the result of an aggravated robbery.

17 THE COURT: Do you wish to respond?

18 MR. WATKINS: Your Honor, the case law is
19 very clear that if one is charged with the A and B sections
20 of the aggravated murder charge, count one being prior
21 calculation and design, count two being the felony murder
22 charge, that the election would take place at the second
23 stage assuming the defendant would be convicted of one or

1 both -- I mean, assuming he would be convicted of both. This
2 very issue was decided by the Ohio Supreme Court in State
3 versus Getsy where Getsy was charged with felony murder and
4 prior calculation and design murder.

5 The reason is very simple. A jury could reasonably
6 find that there's not sufficient evidence in a case, for
7 whatever reason, that there's not prior calculation and
8 design, and, on the other hand, a jury could find to the
9 contrary, that there was an intentional killing during the
10 commission of felony murder. So that is why the Ohio Supreme
11 Court has uniformly held, and I know Chuck and I even
12 discussed the case within the past year, affirming that,
13 which we could get for the Court, but it's very clear that at
14 this point in time it's appropriate, even though there's one
15 death, to have two charges go to the jury.

16 THE COURT: It is possible, is it not,
17 that the jury could find a question of guilt on one or both?

18 MR. WATKINS: Right. They could find a
19 felony wasn't committed, so the jury has the choice.

20 THE COURT: Does the State agree that in
21 case of a finding of guilty on, say, both that the defendant
22 can only be sentenced on one?

23 MR. WATKINS: Interestingly, the Supreme

1 Court allowed a death penalty panel to go with both and the
2 Supreme Court upheld it saying that the better procedure is
3 to elect. We would elect before the jury gets it.

4 THE COURT: I think, if that were the
5 occurrence, that would be the proper way to do it.

6 For this portion of the motion the State has
7 presented good and sufficient evidence wherein a reasonable
8 mind might find from the facts that this was a purposeful
9 killing with prior calculation and design which caused the
10 death of another and have established the question of venue.

11 I say that based on the evidence that has been presented to
12 this jury primarily from the letters, content of some of the
13 letters, the telephone conversations from the prison, the
14 conduct of the defendant, that the jury accepts the State's
15 evidence as to the conduct of the defendant following the
16 alleged murder.

17 The State has also presented good and sufficient
18 evidence where a reasonable mind could find that there was a
19 purposeful causing of the death of another during the
20 commission of an aggravated robbery or aggravated burglary.
21 And I'll get into those other two points later because I
22 think you want to argue those. Venue was established in
23 that, of course, in that case also.

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1 MR. CONSOLDANE: All right. Your Honor,
2 we would also like to move that both the count -- I believe
3 it's three, aggravated -- count three, aggravated burglary,
4 yeah, that that be, that that be dismissed being that they
5 did not show by any evidence that Mr. Jackson did not have
6 permission to be upon the property. The property was owned
7 by Donna Roberts. And if you believe Nate Jackson's
8 statement that the State played to the jury, they presented
9 it, we didn't, but in that, in that statement Mr. Jackson
10 says that Robert Fingerhut picked him up at C. Staples
11 Restaurant on Belmont Avenue in Youngstown on the guise of
12 taking him to the Warren bus station and on the way he said
13 he had to stop at the house on Fonderlac for a minute; and he
14 pulled into the garage and got out and that's where the
15 altercation took place; that he certainly was brought there.
16 If you believe the prosecutor's argument that he and
17 Donna Roberts somehow or another contrived to plan to kill
18 Fingerhut, he would have had express consent from Donna
19 Roberts to enter upon the property to carry out their mutual
20 plan. So either story that you believe would necessitate
21 having the aggravated burglary charge dismissed because it's
22 failing in one of the essential elements in that they have
23 not shown that he did not have permission to be on the

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1 property or, in essence, that he was a trespasser.

2 I know they have some arguments that said that if
3 somebody enters on the property and then decides to commit a
4 felony, that that permission is thereby degraded, but then
5 again we have just two arguments that were presented to the
6 jury. One from Mr. Jackson that this altercation was
7 provoked by him, which means that his right to be on the
8 property was never terminated, or two, that he and Donna
9 planned this and that was the permission given to him to
10 begin with for the purpose for him going on that property.
11 So in either event the aggravated burglary should be
12 dismissed.

13 Is there anything you want to add to that, James?

14 MR. LEWIS: Judge, in regard to the
15 aggravated burglary, the question is his privilege. And it
16 becomes interesting to note that based upon the story given
17 by Nate Jackson that he was actually picked up at C. Staples
18 to be taken to the Warren terminal. That once Mr. Fingerhut
19 decided not to take him to the Warren terminal but took him
20 to the Fonderlac address, that basically he was in the
21 commission of an abduction or a kidnapping where he had by
22 deception got Mr. Jackson in the car, and once in the car
23 then he decided to take him to some other place other than

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1 what he had proposed to take him in the first place and went
2 to the house. There was no indication whatsoever.

3 If, in fact, that was the case and he did deceive
4 him and there was a kidnapping or an abduction going on, as
5 soon as he entered the house, that is Mr. Fingerhut, then he
6 was, in fact, committing an aggravated burglary when he
7 decided to pull a gun and to shoot at Mr. Jackson.

8 The State is proposing that Mr. Jackson somehow
9 became a trespasser when the argument ensued and, according
10 to their brief, once Mr. Fingerhut pulled out a gun to shoot
11 Mr. Jackson, then poor Mr. Jackson becomes the trespasser.

12 That is a very novel theory in the sense that what that says
13 to you, judge, is that I can invite Mr. Chris Bobby here, a
14 fine fellow from the Warren Tribune, I can invite him over to
15 my house, and as soon as I pull out a gun and go ahead and
16 shoot him he becomes a trespasser and he committed aggravated
17 burglary and I can just kill him at will. That's pretty
18 nonsensical and that's what the State is proposing here.

19 There is no indication whatsoever, there is no
20 testimony per se in here or credible evidence indicating the
21 fact that Mr. Nate Jackson did not have permission to be in
22 that house. There's nothing whatsoever.

23 The State keeps saying, well, Donna Roberts called

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1 up, said my husband. Well, we know that's not a fact in
2 reality. The point being here is that the State is alluding
3 to all the so-called statements made and all the other
4 information but it's not the actual evidence in trial in the
5 sense it doesn't prove anything. If I call up and say, "My
6 god, my wife, my wife Peggy over there has just been shot,"
7 okay, and I go to court and Peggy says I'm not her husband
8 and she's not my wife. Just because I got on 911 and said my
9 wife got shot, does that make it reality? No, it doesn't,
10 and it doesn't change the legal relationship.

11 The point being is that in the first two pages of
12 their brief they indicate that all of this is supposedly true
13 when, in fact, we know it isn't. They keep referring even in
14 their briefs now, they say Robert Fingerhut's car. We know
15 for a fact in reality, it's been proved in this courtroom,
16 that it is not his car. He doesn't have any possessory
17 interest in that car whatsoever as far as that's concerned.
18 Not only that, the State's own evidence shows that in the
19 letters, that as of 11/29, five or six days before this
20 incident, Robert Fingerhut was beating, was beating Donna
21 Roberts to a pulp. There's indications in there.

22 If he was beating her in her house, which she says
23 happened and it's in the letters and everything else, I think

1 Mr. Fingerhut is a felon. He's committing -- he has
2 withdrawn his permission to be there because he had no
3 possessory interest in that house, he had no legal interest
4 in that house whatsoever. Donna Roberts is the owner. He
5 beat the owner so he's violated by deception. He got in that
6 house and committed a crime against Donna Roberts, which is a
7 felonious assault, and therefore he, in fact, is the one who
8 is guilty of aggravated burglary.
9 You can take these sequences on to forever. It's
10 ridiculous, because they're changing and trying to turn
11 upside down completely everything. What they're proposing to
12 say is that a burglar can go out to 254 Fonderlac, it's empty
13 right now, he can go in there and sit in there and enjoy
14 himself. And if the police come, if the police come or
15 somebody else comes to evict him out of there, they come in
16 the house, since he's a possessor, he's there, he's got
17 custody of it, he's got custody of it, that's all they're
18 saying. He's just a possessor, his body is there, he can use
19 legal force against somebody, perhaps the owner. The owner
20 comes back and says I want my house back. Oh, no, if you
21 come in and try to hurt the guy that's possessing it then
22 you're guilty of aggravated burglary and if you kill him it's
23 aggravated murder. Nonsense. This is all nonsense, judge.

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1 They've turned this thing completely upside down
2 because the ownership has a lot to do with this. It has a
3 lot to do with the way Mr. Jackson got to the house. And
4 under any theory they still have to say without privilege to
5 be there. And nonsense about pulling a gun out. Once
6 Fingerhut pulls a gun out then somebody becomes a trespasser?
7 He's going to kill somebody. Then the other person, the
8 victim, becomes the trespasser? He's going to shoot and kill
9 him, he's going to sit there and say oh, my God, the
10 prosecutor said I am trespassing, now go ahead and shoot me.
11 That's nonsense. That's nonsense. That can't be the law.
12 It's not the law.

13 So, in fact, the reality here, judge, there isn't
14 any aggravated burglary whatsoever. It has to do with
15 permission to be there and they haven't proved in any sense
16 of the manner, nor can you infer from this, that he had no
17 permission to be there. Mr. Fingerhut had not the legal
18 authority one way or the other to pronounce who could be
19 there and who can't be there. I don't care if he lies or
20 whatever or says anything, he still is not the person that
21 has the ownership or control of that property. It's really
22 Donna Roberts. He was -- as soon as he does anything wrong
23 he becomes a trespasser in the residence. I don't care if he

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1 steals her money from her accounts, does anything, he becomes
2 the criminal. If she called him up the night before and said
3 get out, I got news for you, he's an aggravated burglar at
4 that point. That's what it boils down to.

5 THE COURT: Okay.

6 MR. LEWIS: That's it, judge.

7 MR. WATKINS: And, Your Honor, maybe we

8 attended a different trial and I will make a few comments.

9 Seldom does a Court have so much evidence to substantiate a

10 plan to murder and ambush a person as we have here. We have

11 the defendant's words, we have the defendant's declarations

12 in letters that are repeated time and time again that when he

13 gets out of prison he is going to take care of the Robert

14 problem. He even describes that when he does the guy that he

15 wants -- in fact, they both discussed they want to commit a

16 sex act in front of the victim. It is as malicious as you

17 can get if the Court or the jury decides to believe the

18 State's evidence.

19 I would note that the defendant's statement is not a

20 statement we're vouching for, it is a statement that has

21 admissions. It's up to the State or any party that is the

22 plaintiff or defendant to construct the evidence and what

23 they believe is reasonable and true. In my opening statement

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1 I made it very clear that the evidence outside the
2 defendant's statement is going to show he was lying about
3 being in Youngstown and many of the things he said, including
4 the fact that the victim had a gun, an epiphany appeared
5 where the gun appeared and pulled it on the defendant; and
6 dealing with the logic of how the victim was shot in the top
7 of the head, shot twice in the back; dealing with the
8 statement at the end where he said Donna knew nothing about
9 it, had nothing to do with it; is contrary to the taped
10 conversation that was taken two days before at prison where
11 he says, "One thing you have to do, I have to be in the
12 house," and Donna responds, "No, no, not in the house." And
13 what does the defendant say? "It's not going to be in the
14 house."

15 In fact, it is clear from the letters that there
16 were things that the defendant wanted. Black leather gloves.
17 He got the black leather gloves. Three witnesses testified
18 it wasn't that cold. And, in fact, the description in the
19 letter that's going to go to the jury, black leather gloves,
20 fleece inside; exactly the same black leather that has the
21 left index finger shot off. Handcuffs. There is an argument
22 on the tape and in the letters about why do you want it so
23 complicated with --

1 MR. CONSOLDANE: Your Honor, we were
2 arguing aggravated burglary, we're not arguing the murder. I
3 don't know where he's going with this.

4 MR. WATKINS: It deals with burglary.

5 THE COURT: I think he is trying to rebut
6 your argument.

7 MR. CONSOLDANE: I'd just like to remind
8 the Court that I have to leave, we have to take a break
9 around 2:30, quarter to 3:00. I have a doctor's appointment
10 I have to go to and come back. I just --

11 THE COURT: Let's go on.

12 MR. WATKINS: Thank you, Your Honor. The
13 evidence in short shows that there was a state of mind to go
14 to that house and kill the victim who was coming home from
15 work. Look at the clothing that's been demonstrated that he
16 had at work, where he's shot, exactly the fact that he's
17 reading the mail, according to the defendant's own statement,
18 that this man is in his home. The purposes of bringing in
19 Donna Roberts' 911 and the letters and the conversations,
20 he's at home, he's at home, is the fact of the matter that
21 this man is living there as a co-resident, as a co-occupier.

22 Mr. Lewis and Mr. Consoldane says the title is the
23 important thing. Not in the case law and not in the

1 legislative service. The purpose of an aggravated burglary
2 law is to protect people that are in homes, are in occupied
3 structures. Has nothing to do with title. All of us have
4 children, have people visit a home, and the fact that the
5 children may not have title, that's their home and they are
6 protected as a co-occupier of the home. The law protects
7 them.

8 In this case it's the worst possible scenario, and
9 we have case law that is in our brief that if you're in there
10 invited and you commit a violent felony to an occupier of the
11 home you become a trespasser by the commission of the act.
12 Our evidence is very clear that he intended to go there and
13 take the man by force and put him in the trunk whether dead
14 or alive, and we know in the struggle he was shot, according
15 to the State's evidence as we would believe any reasonable
16 finder of fact would find. And at that point when he's in
17 that house under State versus Steffen he is a trespasser as
18 to the co-occupier, Mr. Fingerhut. He came home, went into
19 the house, irrespective of whether or not he was invited to
20 be there by the defendant, the codefendant, which I believe
21 he was, according to our evidence. He was in there for the
22 purpose of taking the life and ambush the fellow resident,
23 the man that Donna Roberts was living with, for the purpose

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1 of collecting money. That is all the State has to show, that
2 he was a person in the house. In this case there's two
3 subsections dealing with aggravated burglary; one, it was his
4 habitation where he was living; two, he was present in that
5 house. And no one, including the legal owner, can tell
6 somebody to go in and kill in that house and commit a crime
7 against someone else who is a co-occupant.

8 There is nothing in the record that showed that
9 Donna Roberts ever told Robert Fingerhut to get out. In
10 fact, if you look at the one letter it's very clear that the
11 defendant says, "Make sure everything is okay. Keep him in
12 the house until I get out of prison." That's in evidence.
13 So it's very clear the question of law is whether or not by
14 allowing someone in the house, that another resident comes
15 home, whether or not he could kill. And as a matter of
16 public policy and the matter of State versus Steffen, he
17 commits the trespass, the felony, against a person that's in
18 his occupied habitation or he's present in that home lawfully
19 and, therefore, the purpose to kill the man at home is
20 clearly sufficient by the evidence to let this go to the jury
21 on the charge of aggravated burglary, which is also one of
22 the underlying felonies on the charge of aggravated murder.

23 MR. CONSOLDANE: Your Honor, I just real

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1 briefly, I just -- he's evading the issue as to whether or
2 not he had permission. It's up to them, they have to show
3 that he did not have permission to be there, not just add
4 inference upon inference that this could have happened or
5 that could have happened. They have to prove their case and
6 they didn't prove it.

7 MR. WATKINS: Judge, we proved he's in his
8 home. It's his home, it's his structure.

9 MR. LEWIS: Wait. Don't say, don't say --

10 MR. WATKINS: It's his home for --

11 MR. LEWIS: No. In the letter in

12 November, in November a couple days before this happened he
13 was staying at motels, for god sake. It was right in the
14 letter, judge, that he was out of that home, he was staying
15 in a motel room.

16 MR. WATKINS: He was not --

17 MR. LEWIS: This is Robert Fingerhut. It
18 wasn't his home. Don't say that.

19 MR. WATKINS: It's his home.

20 THE COURT: I don't think there's any
21 question from the evidence produced by one side or the other,
22 this was not a house that was in the name of Mr. Fingerhut.
23 He was not the legal title holder. However, if I for some

1 reason am carrying my wife's purse down the street, which
2 I've done on occasion, always creates embarrassment, to
3 follow the defense's argument, if somebody comes by and grabs
4 the purse then I have not had a robbery committed on me. If
5 I'm a month-to-month tenant on a lease --

6 MR. LEWIS: That's not the argument,
7 judge.

8 THE COURT: No. If I'm a month-to-month
9 tenant -- I'll allow you -- and I have possessory interest in
10 my dwelling, then no one can come in and commit burglary on
11 me because I'm not the legal title holder. I don't think
12 that that is the law.

13 MR. CONSOLDANE: Your Honor, everybody is
14 misinterpreting that. We don't care, that's not the issue.

15 THE COURT: No, I understand. I'm getting
16 to the issue. I'm getting to the issue that you're -- you
17 are contending here that Mr. Fingerhut was not living at the
18 house. Now, the State has produced evidence to show that he
19 drove one of the vehicles that was owned by Donna Roberts.
20 It's the testimony that he always drove that vehicle. There
21 was some testimony of one person who saw him driving her
22 vehicle at one time, which I think merely substantiates the
23 State's allegations. That you had the letters that talked

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1 about him in regard to the house, you had conversations on
2 the phone.

3 Now, the State has presented some evidence. I don't

4 know, it's up to the jury to decide how convincing the

5 evidence is, but evidence to put forth the theory that

6 Ms. Roberts dropped the defendant off that night and he was

7 perhaps waiting in the house. Fingerhut apparently had a key

8 to come and go in the house, but there's no evidence on that.

9 Somehow he was able to get into the house. The jury could

10 infer that he had a key on that basis. If you accept the

11 State's one proposal that the defendant was dropped off and

12 allowed access to the house, then the question becomes, even

13 though she is the titled holder of the house, can she give

14 permission that would stand at law to go in and do what the

15 jury could find had been planned to be done, and that is to

16 kill her ex-husband? The State has raised case law that

17 seems to me to be pretty convincing that that could not be a

18 legal defense, "Well, I had permission to go into the house

19 to kill him."

20 If you accept the -- if the jury should accept the

21 defendant's version of how he came to be there, that

22 aggravated burglary -- and none of you have mentioned this

23 portion here, a person who enters by force, stealth or

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1 deception. The jury could I think very logically concur that
2 they had planned this thing, that whether it was Fingerhut's
3 suggestion or the defendant's suggestion that they go to the
4 house, that would be by deception on the defendant's part.

5 Now, that's all predicated in overruling the defense
6 position that Fingerhut had any possessory interest in the
7 house. That's for the jury to decide. But there is good,
8 sufficient, credible evidence before this jury that they can
9 conclude logically that Fingerhut was, in fact, a dweller in
10 that house with the permission of the title holder.

11 And there was one other point. Oh. You have not
12 specifically argued this I don't think, but I'm going to
13 cover it anyways in regard to the robbery because your same
14 argument would apply on the robbery, that the title of the
15 car was in Donna Roberts' name. I think again there is
16 sufficient evidence before the jury to show that he was a
17 continual and constant and almost sole driver of that
18 automobile, and again that comes into mind that if he cannot
19 have -- it could not be a robbery because he didn't own the
20 car. It's the same as if I'm given a cash deposit from a
21 business to take to a bank and I'm robbed of it, it's still a
22 robbery whether I owned the money or not. For that reason I
23 am willing to listen to other argument on any points you take

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1 umbrage with.

2 MR. CONSOLDANE: We haven't even argued
3 the robbery. I was going to argue that next.

4 THE COURT: Well, you can go ahead and
5 argue it. I'm just saying that the same thing applies on
6 that point.

7 MR. CONSOLDANE: Well, yeah. But, Your
8 Honor, I think the Court is missing the point, it's that it's
9 not upon us to prove anything. It's the State's duty to
10 prove each and every one of the elements.

11 THE COURT: I agree, I agree with that
12 totally, and I think that Mr. Watkins will of necessity agree
13 with you because that's the law. But I'm saying that the
14 State has constructed a case that the jury may find your side
15 of it, but for purposes of this motion is to determine
16 whether or not there is evidence where the jury might find
17 that the elements are true, is there good and sufficient and
18 credible evidence in the record.

19 MR. CONSOLDANE: They have no, they have
20 presented no evidence to this jury to show that Nathaniel
21 Jackson did not have permission to be on the property of
22 Donna Roberts. They have not one place. They haven't shown
23 -- and they admit there is no force and there is no stealth.

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1 The only thing they're claiming is deception and, you know,
2 that he entered, that's No. 1; and No. 2, without the
3 permission of the owner, and there's no way, they have
4 presented absolutely no evidence to show that he did not have
5 permission of the owner to be on the property.

6 MR. LEWIS: Judge, let me just for
7 example, the examples you just gave us, okay. First off,
8 you're carrying your wife's purse down there, that's very
9 helpful, but somebody comes up and steals it. Chris comes
10 along and steals the purse, supposedly steals it, takes it
11 away from you, okay, and they go to court and charge him with
12 theft, okay. And they bring in John Stuard and John says,
13 "Yeah, I was walking down the street and this guy grabbed
14 this purse." Well, the first thing you want to find out,
15 "Well, it's your purse, Mr. Stuard?" "No, it's not." "Well,
16 whose purse is it?" "Well, it belongs to my wife." And the
17 wife gets on and says, "I never gave permission for Chris to
18 go ahead and take this purse."

19 You always have to have that because here's the
20 problem: The example that you're talking about is you're
21 driving down the street, I'm deciding to drive Chris's car.
22 I'm driving down the street and the police arrest me and they
23 say, okay, "Are you the owner of the car?" "No, Chris Bobby

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1 is the owner of the car." And they say, "Well, tough luck.
2 We're going to charge you with theft of a motor vehicle and
3 unauthorized use of a motor vehicle," they go and they indict
4 me because they found me in Chris's car and they don't bring
5 in Chris to show that he's the owner and he actually gave me
6 permission to drive the car.

7 What you are saying to us is that it makes no
8 difference who the owner is, you can't imply that there is no
9 permission or ability to use that vehicle because, if that
10 were the case, what they're proposing to do here is exactly
11 that. They're saying if I'm found in a house, if I'm found
12 in his house and they say, "Okay, whose house is this?" "It
13 belongs to Chris Bobby." "Who are you?" "I'm Jim Lewis."
14 "Okay. You're charged with burglary," take me down and
15 charge me. And what we're saying here is that the
16 prosecution can indict me for burglary, put me on trial,
17 never bring in Chris and just say it was Chris's house, he
18 was with her, somebody possessory.

19 Or let's say somebody else was there that doesn't
20 even own the house, just a neighbor or somebody around there,
21 or a friend and neighbor comes in every day so he's the
22 possessory interest. And they go, well, this guy has a
23 possessory interest so naturally he says Lewis doesn't belong

1 here so they convict me of aggravated burglary. Chris says,
2 " Lewis is my friend too, he's allowed in my house." There's
3 the problem, judge. That opens the complete door to the idea
4 of what they're saying is anybody found anywhere in
5 possession of anything, they become paramount to the owner of
6 that, and that's really -- you can't have that.

7 I'm picking up this thing right here, I'm the
8 possessor of it, and he decides to take it away from me,
9 okay, so we charge him with theft. But the owner of the
10 property is Trumbull County and Trumbull County, the
11 commissioners said, "You know something, Dennis is allowed to
12 use the Scotch tape." That's the problem here. That's the
13 problem in regard to the car. That's the problem in regard
14 to the house. You cannot go beyond those limits. They have
15 got to prove it, and Anthony is right, they're the ones who
16 have to prove that there was no privilege. They're the ones
17 that have to prove. You can't just infer it because what
18 you're inferring is that something that is a positive element
19 they have to prove and you can't do it without the owner of
20 the property, you can't do it, because he doesn't have an
21 ownership interest. He's just found there. It can't be
22 done. You're going to open the door to everything I just
23 indicated.

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1 Somebody will be guilty of aggravated burglary if
2 they're -- somebody just decides, oh, you don't belong here.
3 I'm over -- we go to a hotel and I say, "Yeah, nice to see
4 you, Chris." I'm in my room and I say, "You know something,
5 I don't like you being in here." That's an aggravated
6 burglary, okay, and it turns out, okay, you don't belong in
7 the room, whatever. But it turns out he paid and the hotel
8 said, "Oh, yeah, he paid, he's entitled to be in there," but
9 they don't bring him in, they just said I was in there and I
10 don't like that guy. That's an aggravated burglary. He
11 stole my toothpaste! There's the problem here, that's the
12 problem. That opens Pandora's box.

13 We're going to have burglars where people just are
14 in a place where they're supposed to be and they don't have
15 to bring in the owner anymore. Forget the title holder,
16 forget the guy that controls it who had the possessory
17 interest in it, the real possessory interest in it. That's
18 what it is going to open up. Every time a car is stolen we
19 don't have to prove title anymore. What do you mean prove
20 title? That always had to be proven. Now we don't even have
21 to worry about it. We don't even have to prove who owned the
22 damn thing. House burglarized? Forget the owner. Who
23 cares!

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1 MR. CONSOLDANE: Your Honor, the problem
2 with this thing is --

MR. CONSOLDANE: Could I do MR. LEWIS: That's the problem.

4 MR. CONSOLDANE: -- that this is actually,
5 this is actually either an aggravated murder with prior
6 calculation and design or there's an argument of
7 self-defense. They've bootstrapped this case to prevent us
8 from putting on a defense of self-defense and it's
9 unconscionable.

10 The same arguments do apply for both the robbery and
11 the burglary, is that there's no proof that he did not have
12 permission to drive that car, but there is one other further
13 point that I don't think that the Court has considered, is
14 that when -- one of the elements in an aggravated robbery is
15 that the person has to commit a theft offense, and under the
16 theft section, No. 5 in the subsection of that is that he has
17 to intend to permanently keep that item away from the person
18 he took it from. And even if he had taken that car he had no
19 intentions of keeping that car. He abandoned it with the
20 keys less than 10 miles away from where he took it, seven or
21 eight miles from where he took the car. So they, you know,
22 they don't have --

23 THE COURT: Asportation.

1 MR. CONSOLDANE: Right.

2 THE COURT: Remember asportation?

3 MR. CONSOLDANE: Could be transportation,
4 unauthorized use, but it's not a theft. And that's the
5 reason --

6 THE COURT: The only thing that could give
7 credence to your argument would be that if he had permission
8 -- it doesn't apply to the burglary but it might apply to the
9 robbery, if he had permission to drive the automobile by the
10 title owner then I think there's credence to your argument.

11 MR. CONSOLDANE: Well, we don't have to
12 prove that. They have to prove he didn't and they didn't do
13 that.

14 THE COURT: Well, I understand.

15 MR. LEWIS: Not only that, judge, there is
16 evidence. It is in the letters indicating she thinks he's a
17 great driver, he can always drive the cars.

18 THE COURT: What's your response?

19 MR. WATKINS: Your Honor, it's -- I mean,
20 I think the travesty here is that the woman who was the
21 witness or title owner is involved with the conspiracy to
22 kill the man.

23 THE COURT: And she's not going to testify

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1 about anything.

2 MR. WATKINS: Yeah. And so as a matter of
3 public policy it's sort of ridiculous and it's certainly
4 contrary to --

5 MR. CONSOLDANE: It is no more ridiculous
6 than --

7 MR. WATKINS: Well, listen, did I
8 interrupt you? Your Honor, repeatedly they've been doing
9 this.

10 MR. CONSOLDANE: All right. All right.
11 I'm sorry. I apologize.

12 MR. WATKINS: Your Honor.

13 THE COURT: Go ahead.

14 MR. WATKINS: Your Honor, this title, you
15 know, definition of owner for personal property does not say
16 title owner. Owner under Ohio law, if they would read the
17 law, includes --

18 MR. CONSOLDANE: Now I object to that.

19 MR. WATKINS: Well, okay.

20 THE COURT: You just called him
21 unconscionable though. Take umbrage.

22 MR. LEWIS: We're worried about a house
23 and we're worried about a car.

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1 MR. WATKINS: Listen.

2 MR. LEWIS: A car has a title.

3 MR. WATKINS: Your Honor.

4 MR. LEWIS: A house has a deed.

5 MR. WATKINS: Your Honor.

6 MR. LEWIS: Don't say something else.

7 Those are the two things we're talking about.

8 MR. WATKINS: Your Honor, I'm going to go

9 -- I just got it. Revised Code section 2913.01, under Ohio
10 law owner means any person, other than the actor, who is the

11 owner of or who has possession or control, and it even goes
12 further that even if the controller possession is unlawful.

13 That is an owner under Ohio law.

14 THE COURT: I understand.

15 MR. WATKINS: And that goes to my basic
16 point where I'm getting objection when I'm saying the car, he
17 has it, he's the owner. I can say that because that's Ohio
18 law.

19 THE COURT: I understand. Their point is
20 much more narrowly drawn and that is that the State has to
21 prove each and every element and they're arguing, I don't
22 know how legitimately, but they're arguing, Jim Lewis makes
23 it sound very good, that the State has to prove the lack of

1 permission. Now, you got a dead guy -- or, I'm sorry, the
2 deceased person who can't testify to anything, you got a
3 codefendant who can't testify to anything. You have only the
4 defendant who has not testified to anything.

5 MR. WATKINS: Yeah.

6 THE COURT: Okay. But what has the State
7 proven? They've proven that the car was taken, if you
8 believe the forensic, by Mr. Jackson.

9 MR. WATKINS: I think that whether -- if
10 you take Mr. Jackson's statement, he says it was the man's
11 car. Okay. And then if you take the other evidence, the
12 workers, that he drives that car home. How did he get home?

13 THE COURT: There's sufficient evidence to
14 indicate that he had possession.

15 MR. WATKINS: His property is in the car,
16 his DNA is in the car, his keys were identified.

17 THE COURT: I'm not arguing that point
18 with you.

19 MR. WATKINS: It was his car under
20 circumstantial evidence. That's all we need to do.

21 THE COURT: That -- I agree with you.

22 MR. WATKINS: So, therefore, if he has a
23 deadly weapon and kills the man and takes the car, there's

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1 Ohio Supreme Court law if you take a car and abandon it it's
2 still a theft offense. If you take it after you kill it's
3 still a theft offense. And State versus Palmer says even if
4 you only decide to steal after the death it's while
5 committing, and that's in line with State versus Biros, which
6 we won in the Supreme Court when the Court of Appeals
7 reversed us, the fact that he killed the person and took the
8 ring. The defense argued oh, you can't steal after a person
9 is dead. Wrong. And that's what we're entitled to argue,
10 Your Honor. We're entitled to argue the law of Ohio, not
11 Mr. Lewis's interpretation of title. It's not important in
12 this case.

13 THE COURT: Mr. Watkins, you are preaching
14 to the choir here. I agree with you.

15 MR. WATKINS: So that's my statement.

16 MR. MORROW: Judge, if I may add.

17 MR. CONSOLDANE: Your Honor, they're
18 bootstrapping us in both cases. They say they can't prove
19 something, you know, because of -- you know, it's the same
20 way. They're trying to bootstrap us with the burglary and
21 robbery and then they're saying it's not fair that they get
22 bootstrapped, they can't get a witness.

23 THE COURT: I see the examples that

1 Mr. Lewis gave. I don't disagree with those, that would be
2 no way, but in this particular case, this is a case where the
3 State has put in a bunch of evidence and that instruction
4 about the jury may infer, not inference on inference but the
5 jury may infer. They have more than sufficient evidence here
6 to infer based on the facts presented that Mr. Fingerhut was
7 the possessory owner of that car, that Mr. Fingerhut would
8 not have given him permission to drive the car after the
9 murder occurred. Therefore, the elements are met of the
10 aggravated robbery.

11 I don't know what the jury is going to do. They may
12 find that that evidence is not convincing. But for purposes
13 of this motion there is sufficient evidence to prove those
14 points that the jury makes the inferences which the State
15 wishes them to make. It's up to the jury to decide whether
16 those inferences are reasonable or not.

17 That being said, the motion, the Rule 29 motion is
18 overruled. The Court of Appeals has a record to second guess
19 on. Okay.

20 MR. WATKINS: Thank you.

21 THE COURT: Not the Court of Appeals --
22 well, yeah, the Court of Appeals possibly.

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MR. WATKINS: It depends on what the

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1 verdict is.

2 THE COURT: Mr. Lewis, please do not look

3 soldown. To repeat to them

4 MR. CONSOLDANE: Pardon?

5 THE COURT: Jim had a long face there.

6 MR. LEWIS: Oh, I've just begun to fight.

7 MR. CONSOLDANE: All right. The next

8 issue is whether or not they're going to present their

9 rebuttal.

10 THE COURT: Rebuttal witnesses.

11 MR. WATKINS: I don't think that's -- how

12 is that an issue?

13 MR. CONSOLDANE: I just want to know

14 whether you're going to or not.

15 MR. WATKINS: Oh, yeah, we are, tomorrow

16 morning.

17 MR. CONSOLDANE: Your Honor, and the two

18 witnesses?

19 MR. WATKINS: Yeah, two or three at most.

20 MR. CONSOLDANE: We're going --

21 MR. LEWIS: Wait a minute. Wait a minute.

22 This rebuttal evidence is going to rebut the fact that she

23 was the owner of the property or what?

1 MR. WATKINS: It is going to rebut your
2 witnesses on the car and the property which you brought in.

3 MR. CONSOLDANE: We object to that.

4 MR. WATKINS: It's going to go to what
5 your evidence was.

6 MR. LEWIS: Okay. So you're going to
7 prove that she wasn't the lessee, somebody else was the
8 lessee?

9 MR. WATKINS: You're --

10 MR. LEWIS: Oh, bring them on, Dennis.
11 Bring them on.

12 MR. CONSOLDANE: We won't -- in no way
13 will we be able to be prepared to give final arguments
14 tomorrow if they're going to put rebuttal witnesses on.
15 They've asked for, you know, the time. I think I should be
16 given that amount of time also to do final arguments.

17 THE COURT: Do you have any rebuttal?

18 MR. CONSOLDANE: I don't know until I hear
19 their rebuttal witnesses, and so I just, you know, there's
20 just no way we'll be able to prepare and give final arguments
21 tomorrow. Let's see what they do and maybe, maybe we can on
22 Wednesday.

23 MR. WATKINS: I don't mind doing it

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1 Wednesday, Your Honor. That's okay with me. I mean, the
2 State was in a position that they presented witnesses and we
3 talked to some of the witnesses and we're -- just like they
4 have a right, they just presented evidence and I said that we
5 would let you know if we have rebuttal witnesses and we do,
6 and they won't take half an hour.

7 THE COURT: Well, I don't know if it's
8 possible for us to call all the jurors and tell them to bring
9 their swag in with them the following day because I don't
10 want them all traipsing in here tomorrow with all their
11 impedimenta, is that it?

12 MR. CONSOLDANE: What is that?

13 THE COURT: And then have --

14 MR. WATKINS: Well, judge, I don't know
15 what else to say, I mean. I would be willing to give what
16 exactly they're going to testify to, if that's helpful. I
17 don't think it's very much other than it deals with the
18 control and possession of the silver car by the victim. The
19 day before he's servicing it. It's relevant evidence in
20 response to their title testimony.

21 THE COURT: Well, we had the other issue
22 of the final instructions, too.

23 MR. LEWIS: He stole the car and took it

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1 to Preston's.

2 THE COURT: How will this work out if I
3 have somebody call the jury, tell them to be here in the
4 morning for whatever evidence we have to put in yet; send
5 them home again; we spend tomorrow going over the
6 instructions; get those typed up; have them come in
7 Wednesday? That way they'll all have a chance to vote, too.
8 That's going to --

9 MR. CONSOLDANE: Yeah.

10 THE COURT: Is that okay?

11 MR. CONSOLDANE: And hope they vote the
12 right way.

13 THE COURT: Yeah. I should probably check
14 with which way they're going to vote beforehand.

15 MR. LEWIS: Judge, just for procedure,
16 they gave us a motion in limine in regard to the evidence
17 regarding his phoney department of justice stuff and his
18 phoney bags from Florida and all that kind of stuff. I
19 thought you already ruled on that. Didn't you rule?

20 MR. CONSOLDANE: Yeah.

21 MR. WATKINS: I thought you did too, but I
22 just wanted to make sure when we put the instructions back
23 together.

1 THE COURT: Yeah, I found that that was
2 not relevant --

3 MR. LEWIS: Okay. I just wanted to make
4 sure.

5 THE COURT: -- unless he took the stand
6 and was trying to put forth a self-defense, you know. It
7 might come in that way.

8 MR. LEWIS: All right. I thought I had
9 forgotten.

10 MR. WATKINS: Thank you, Your Honor.

11 THE COURT: Okay.

12 MR. CONSOLDANE: Well, Your Honor, to
13 answer your question as far as that goes, I believe that I'll
14 be able to answer that better after they finish with their
15 rebuttal as to whether we're going to have any rebuttal.

16 Now, if we don't have --

17 THE COURT: My question is, though, is
18 that going to take another day then to do that because --

19 MR. CONSOLDANE: Well, I don't know what
20 they have. And, you know, maybe -- if it's something that we
21 can --

22 THE COURT: You have to decide that before
23 I dismiss the jury tomorrow.

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1 MR. CONSOLDANE: Yes, yes, I will do that.

2 We can take a break and then I can, you know, we can dismiss

3 the jury, then we can work on jury instructions.

4 THE COURT: Kelly, this is going to be a

5 long week. Okay.

6 MR. CONSOLDANE: All right.

7 THE COURT: I'll see you all tomorrow at

8 9:00. I will try to contact all the jurors then. Thank you.

9 (Whereupon, the proceedings were concluded

10 at 2:39 p.m.)

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12 (NOVEMBER 5, 2002 - 9:33 A.M.)

13 (Whereupon, the following proceedings

14 occurred in chambers outside the presence of the jury.)

15 THE COURT: We are in chambers out of the

16 hearing of the jury. Waive the presence of the defendant?

17 MR. CONSOLDANE: Yes, Your Honor, waive.

18 THE COURT: You have -- as of yesterday

19 the record reflects that prosecution is going to call

20 rebuttal witnesses. The defense has something you want to

21 put on the record.

22 MR. LEWIS: Well, okay. Why don't you

23 have Dennis premise it?

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1 MR. WATKINS: I think you should rest now,
2 Tony. You mistakenly rested before.

3 MR. CONSOLDANE: We -- at this time the
4 defense exhibits have been admitted and, you know, we will
5 formally rest at this time.

6 THE COURT: Okay, fine. Mr. Consoldane,
7 do you have a motion at this time or --

8 MR. CONSOLDANE: Well, okay, yeah. The
9 prosecution wants to call three witnesses, one of which is
10 Diana Marchese, which we don't have any objection to, but the
11 two witnesses he intends to call from the Chrysler dealership
12 we would object to. The records speaks for itself with the
13 evidence that's in there now that these two cars were owned
14 by Donna Roberts. It doesn't make any difference who drove
15 what car. She owned both cars, period. To have them come in
16 and say -- they had enough witnesses already that have said
17 that they saw him driving usually the silver car, although
18 sometimes Donna drove it. That's been the evidence so far.
19 To have some more on it at this time I think is wrong. The
20 issue is not who drove the car, the issue is, we argue, who
21 owns the car, and I just don't think that the Court should
22 allow that.

23 And as long as I'm on that is that I also -- I was

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1 reading last night, was reading over the motion that the
2 State filed in regards to not allowing to attack the
3 character of Mr. Fingerhut and that what I read on that, that
4 is absolutely correct what they said. However, when
5 Mr. Watkins asked his own witnesses what kind of a man was
6 Roberts Fingerhut, I think at that point he opened the door
7 and that we should be allowed to bring in those witnesses,
8 and I think that the Court can allow us to do that on
9 surrebuttal. and that would be --
10 MR. LEWIS: One other thing, judge, in
11 regard to the proposed evidence by Mr. Watkins, the
12 prosecutor, in regard to if you are going to bring the
13 maintenance records in in regard to these two vehicles, that
14 in and of itself --

15 THE COURT: Off the record.

16 (Whereupon, a brief recess was taken.)

17 MR. LEWIS: Okay. I was -- the prosecutor
18 is going to introduce maintenance records in regard to the
19 two Chrysler automobiles that were released and registered
20 under the name of Donna Roberts, evidently to establish in
21 some form or manner some possessory right or whatever in
22 Robert Fingerhut. However, judge, I would indicate that
23 that's totally incompetent evidence in regard to any

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1 possessory right or any control that he had over the vehicle
2 in the sense that anybody can bring a motor vehicle in to
3 have it serviced at a dealership, whatever. The dealership
4 is not going to have qualms about who brings it in as long as
5 the bill is paid.

6 If the bill is not paid they can tentatively sue the
7 other party who brought the motor vehicle in and formed the
8 contract with the dealership. However, they have a lien on
9 the vehicle, they would retain the lien, and that would be
10 enforced against the owner of the vehicle, which would
11 indicate the five days that they can't enforce the possessory
12 right in regard to the person who brings in the car. That in
13 no way, shape or form would indicate that Mr. Fingerhut had a
14 possessory interest in this motor vehicle. That would apply
15 across to boats, that applies to anything.

16 The dealership is interested in one thing, just
17 doing the maintenance work and making money for it and
18 whatever. Who brings the motor vehicle in is of no
19 consequence whatsoever and does not indicate or produce any
20 possessory interest in the motor vehicle.

21 MR. WATKINS: Are you done? Are both of
22 you done?

23 MR. LEWIS: Oh, we would -- yeah, for

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1 that, for countering that.

2 THE COURT: Go ahead.

3 MR. CONSOLDANE: Well, we had two motions

4 there. We have a third to make, but go ahead.

5 MR. WATKINS: Your Honor, the State will
6 present evidence that will show what the law allows and what
7 is relevant in this case. Repeatedly defense counsel

8 misrepresents the law.

9 MR. CONSOLDANE: We do not.

10 THE COURT: Okay. Come on.

11 MR. LEWIS: Let me understand what he's
12 saying.

13 MR. WATKINS: Your Honor, and this has
14 been typical, I don't interrupt them but it's constant.

15 MR. CONSOLDANE: When you say things like
16 that, Dennis, that just upsets me.

17 THE COURT: He is giving his opinion on
18 things, that's all.

19 MR. WATKINS: Your Honor, the question of
20 legal title is not material as a matter of fact and law. The
21 question in Ohio law is owner includes people who have
22 control and possession.

23 The evidence that we are about to present is in

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1 rebuttal to the evidence they presented by way of an employee
2 from Preston Auto Group concerning the title. They are going
3 to be prepared to argue and I think they can. I don't
4 disagree with the ability of defense counsel to present their
5 defense in the sense that they are going to argue that look,
6 here's the title, it's in Donna Roberts' name. However, we
7 have witnesses that are going to testify, one, they've dealt
8 numerous times with this deceased, they know him, and that,
9 in fact, as late as of the day before the homicide he brought
10 in the silver car himself and took the silver car himself the
11 day before the homicide.

12 Other witnesses will include the salesman that is
13 going to go into the fact that he negotiated the terms for
14 the cars. And, additionally, one of the witnesses is going
15 to testify that on these receipts that Mr. Fingerhut charged
16 and signed his name. So he can be identified in different
17 ways as being a person who regularly brought in the silver
18 vehicle and, in fact, brought in both vehicles and, in fact,
19 negotiated the purchase for both vehicles; that Donna Roberts
20 came in once, signed the paperwork, and that was about it.
21 And one other time they brought the vehicle in.

22 That is relevant, Your Honor, in our opinion, and it
23 is appropriate evidence in response to rebuttal since we are

1 going, we are going to prove by the evidence, in our opinion,
2 that he was the legal possessor of the car under law.

3 MR. CONSOLDANE: There is no such thing as
4 a legal possessor.

5 MR. WATKINS: Well, you better read the
6 law because that's what it says.

7 MR. CONSOLDANE: No.

8 MR. LEWIS: Judge, in retort of that is
9 even if Mr. Fingerhut brought these cars in, they still don't
10 have the necessary element. They don't know or they can't
11 establish by chain here that he actually had permission on
12 that day to operate that motor vehicle, and the only way you
13 can establish is by ownership. The argument here is that we
14 have, in fact, in both instances here, and I am getting a bit
15 off the track, but the point is say, for instance, what the
16 State is contending here and even with the aggravated
17 burglary is that once so-called proof of the criminal act --
18 I'm getting off the track.

19 I'm going to go back to the burglary in a minute,
20 but the point, let me get back to the deal here, the motor
21 vehicle, is that there's no indication in the record, okay,
22 whether Donna, Donna Roberts, withdrew her permission for
23 Robert Fingerhut to operate that motor vehicle. There is

1 every indication also possible in the letters indicating the
2 fact that she said, "You can drive those cars, Nate," and
3 it's in the letters that are submitted to the Court.

4 Not only that, in reference to -- I'll jump to the
5 aggravated burglary -- there's references in there about him
6 being in the house and she had him in the house, tacit
7 permission to be in that house. That's before he left prison
8 there's letters about that.

9 The problem here, and I'll give you an example on
10 the aggravated burglary, is that the State's position here is
11 that when a crime is committed, any crime is committed in any
12 place where human beings are, and that's temporary,
13 permanent, it could be a house, it could be a building, it
14 could be this courtroom, it could be this chambers, once
15 there is some kind of criminal offense committed, no matter
16 what it is, that somehow a trespass occurred because your
17 permission to be here is no longer valid. That means that in
18 every case the prosecutor -- if a husband owns a house and
19 the wife comes in and the husband commits a criminal act
20 against the wife, at that point then, even though he's the
21 owner of the house, that somehow his permission to be there
22 is no longer valid, okay, so then he's committed an
23 aggravated burglary. If he happens to kill her then all of a

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1 sudden we have a death penalty case. This is not -- he's
2 emasculating the law. It is getting emasculated to where
3 this would be the obvious position in any case.

4 You can have somebody get in an argument at Kmart
5 with the actual owner of the store, the manager or whatever,
6 who had a right to be there or whatever, but say the owner.
7 He got in argument and he killed one of the patrons. Well,
8 okay. Is his position, because he got in the fight and was
9 the aggressor, that his permission is gone so he becomes a
10 trespasser? If he is a trespasser then he's in a place where
11 people are, even on a temporary basis, so all of a sudden we
12 have an aggravated murder case by bootstrapping, and say it
13 is aggravated burglary. They're emasculating the law, judge.
14 You cannot do that. You may have an aggravated murder here.
15 You may have prior calculation and design, but you do not
16 have an aggravated burglary. You do not have an aggravated
17 robbery.

18 The point being is if you're not the owner of the
19 vehicles, whatever, and you don't have somebody to establish
20 that he didn't have permission, okay, to operate these motor
21 vehicles, okay, then fine, then it comes in. The owner -- it
22 has -- that's Mr. Fingerhut's work. He is the one that did
23 it, okay, and all she had to do is to call the dealership and

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1 say don't give him back my car and they wouldn't have to give
2 him back the car. In fact, if they gave him that car they
3 would be libel. They would be libel for that vehicle if they
4 gave that car back to him when she says no. That's the
5 point. That's the point.

6 The law has to stop and get to ownership. You have
7 to have that. If you are going to turn around and turn
8 everything upside down here and property rights or whatever
9 don't have any effect at all. And not only that, you are
10 going to emasculate everything because, as I indicated
11 before, if they are permitted, permitted to just say you're
12 not the owner of this vehicle, therefore you stole it, we are
13 going to prosecute you and we don't care where the owner is
14 or who he is or whatever. We know that's not the case, but
15 that's what they are pretending to do.

16 "You're in a house. We don't care how you get in
17 the house, it's not your house. You are a burglar. We are
18 going to prove it and we don't care what the owner has to
19 establish," or whatever. That's not the law. The law says
20 without the privilege or it says that it's actual permission
21 to be there, and that's what it boils down to. If they are
22 going to obviate that element they have to prove, all right,
23 then that's where we're going here.

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001 THE COURT: Here is the problem.

002 MR. WATKINS: May I briefly respond?

003 THE COURT: Let me answer this while I
004 have it in mind.

005 MR. WATKINS: Go ahead, judge.

006 THE COURT: And then we can add to it.

007 Your example of husband and wife doesn't fit because a person

008 who owns the property can never be a trespasser on their own

009 property, a legal title holder. There's no evidence that the

010 possessory interest was, in fact, taken back by Donna as far

011 as his right to use the car. There is evidence before the

012 jury that he had consent to use the vehicle. The jury has

013 evidence that they can interpret that that possessory

014 interest was still in effect as of the night of this

015 incident. There's no evidence to the contrary of that.

016 The evidence about, you know, the one of two

017 theories here that Donna dropped him off, he was in there by

018 stealth in regard to Fingerhut is one view that the jury

019 could accept. And as we went over yesterday, you can't give

020 somebody permission to do an illegal act even though you are

021 the title holder of the property. If he went in there with

022 Fingerhut's invitation and he did so by deception, that his

023 intent was to go in and kill Fingerhut, then that vitiated

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1 any permission to be there and it became a trespass the
2 moment that he took up arms against the fellow.

3 There was one other point on your objection, your
4 example of Walmart. Yes. But becoming a trespasser does not
5 give anyone the right to take your life. You have the right
6 to remove a trespasser using any reasonable force. In a
7 trespass situation the only way that you can justify a
8 homicide would be in self-defense, so your arguments, I
9 think, don't stand up to the test that we have to apply here.

10 And I understand what your primary objection to the
11 Court's rulings on a lot of this evidence is and it boils
12 down to the single fact that the State has to prove each and
13 every element, and one of them for the burglary charge is,
14 starts out at the first part of the statute, trespass.

15 Now, we've gone through all this on the record and
16 I've given my reasoning. You have the right to request, I
17 think, that this issue be put before the jury as to whether
18 or not he was a trespasser. The jury can conclude that he
19 was. They could also conclude that he wasn't a trespasser if
20 they believe that Donna gave him permission to be there, but
21 then they have to ignore the instruction of law that says
22 that he becomes a trespasser once he embarked on some
23 wrongdoing.

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1 MR. CONSOLDANE: Your Honor, but what if,
2 what if also we have -- there's two other scenarios that
3 everybody just keeps ignoring. What if Donna asked Nate to
4 come in the house to stay there to protect her from being
5 beaten, --

6 MR. MORROW: There's no evidence.

7 MR. CONSOLDANE: -- you know, by
8 Fingerhut?

9 THE COURT: But there's no evidence that
10 she was in the house at the time.

11 MR. CONSOLDANE: Well, no, but she was
12 going to go back.

13 MR. WATKINS: This is --

14 MR. CONSOLDANE: Allow him into the house
15 not with the purpose of killing him.

16 THE COURT: That I think gets into the
17 area of not inference but speculation as to what --

18 MR. CONSOLDANE: They were doing a lot of
19 speculation, too. And then also is that we already have the
20 evidence, the tape that the prosecutor introduced showing
21 that, you know, where Nate was telling him that he was
22 brought into the house, you know, and Fingerhut was the
23 aggressor, he was just protecting himself. Now, that is

1 evidence that they brought in. We didn't bring that in, they
2 brought it in.

3 THE COURT: That's where the jury has the
4 right, if the jury found that that was what happened, then
5 they, by the very nature of believing that testimony, would
6 not believe that he was a trespasser.

7 MR. CONSOLDANE: There's no evidence to
8 say that it happened any other way.

9 THE COURT: There's no direct evidence
10 otherwise, but there's circumstantial evidence, and they both
11 stand on equal basis. You -- I cut you off, Dennis.

12 MR. WATKINS: Yeah. I just need to
13 indicate first off that defense counsel has yet to cite a
14 case. There is nothing from their argument -- and let me
15 respond without being interrupted.

16 THE COURT: Lewis makes it sound so damn
17 good though.

18 MR. WATKINS: State versus Steffen and
19 Lilly and the case that is cited in our brief I think cover
20 the situation.

21 THE COURT: I have to say I find no reason
22 to not accept your argument because I think it's good law.

23 MR. WATKINS: And I just want for the

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1 record, Your Honor, to indicate there is factual evidence.

2 That res gestae, the 911 tape, is to me very important direct

3 evidence that Donna says they took my husband's car. At that

4 point, "My husband's dead, do anything. They took his car."

5 That's in the evidence from what Paul Monroe said.

6 THE COURT: Well, there is more than

7 enough here for --

8 MR. WATKINS: You see what I'm saying,

9 Your Honor? So if it had been revoked it's contrary to

10 Donna's own declaration.

11 THE COURT: That's what the jury has to

12 sort through. And for purposes of these motions it's

13 apparent to see if there is evidence upon which the jury can

14 make a decision one way or the other, and there is.

15 MR. CONSOLDANE: But, Your Honor, that was

16 hearsay that never should have been allowed in.

17 MR. WATKINS: That's admissible evidence.

18 MR. CONSOLDANE: No, it's hearsay. I

19 objected. It shouldn't have been said.

20 MR. WATKINS: You were overruled. This is

21 what is happening with this record. The rulings of the Court

22 are the rulings of the Court. They can go up on appeal. The

23 evidence that's in is the evidence that we can argue.

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1 And the last thing I would like to say is that
2 Mr. Lewis gave a hypothetical; if the car Robert was driving,
3 if she would call, "Don't give him the car," but if he took
4 the car in spite of the revocation, under Ohio law a person
5 who even has an unlawful possessory interest can't be robbed
6 at gunpoint to get the car back. Even a thief can be robbed
7 under Ohio law and that's very clear.

8 THE COURT: I don't disagree with that.

9 MR. WATKINS: So I feel comfortable that
10 every ruling of the Court is right in line with Ohio law.

11 MR. CONSOLDANE: What about the ruling
12 there, you know, on Dennis opened the door to
13 Fingerhut's character?

14 MR. WATKINS: I want to respond to that,
15 please. I never opened the door because the brief shows that
16 the trait here is for peacefulness. When I said, "What kind
17 of guy was he to work with," I never brought into issue, I
18 never ever said was he a peaceful guy. I didn't bring that
19 into issue. That is what --

20 THE COURT: I stand with my prior ruling
21 that his character does not come into account unless it has
22 something to do with state of mind.

23 MR. CONSOLDANE: Well, Your Honor, that is

1 true, but a second year law student knows you can open the
2 door to something. They opened it. Why can't -- you know,
3 they got in, they got in, oh, he was a nice guy, he made
4 jokes, he did this. If they get into all that why can't I
5 get into that area? Why is he allowed to do that and I am
6 not?

7 THE COURT: Because you can't attack the
8 character of the deceased unless it's material, relevant to
9 the part of the case.

10 MR. CONSOLDANE: That's absolutely true
11 unless the State opens the door.

12 THE COURT: The defendant is not -- the
13 deceased is not on trial here.

14 MR. CONSOLDANE: And that's absolutely
15 true, Your Honor, and I agree with that a hundred percent,
16 except for the fact that he opened the door. He said what
17 kind of guy was Fingerhut?

18 THE COURT: Let me ask you this, Tony,
19 along that line. Assume that it were permissible to bring
20 testimony in so you say he has a federal officer's badge, he
21 has some kind of detective license from Florida and he beat
22 his wife up once in a while. That would be the sum and
23 substance of the bad character?

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1 MR. CONSOLDANE: No. There's some credit
2 card problems.

3 MR. THE COURT: Okay. He wrote --

4 MR. LEWIS: He created a whole different
5 name, judge. He created a whole different name.

6 MR. CONSOLDANE: A whole different name.

7 THE COURT: The he had credit card fraud
8 and he didn't pay his employees but a slave's wages, okay.

9 What does that have to do with anything?

10 MR. LEWIS: Because he said he was a nice
11 guy; he paid slave wages; doesn't report to the IRS; pays
12 under the table; he runs around with a badge from the Florida
13 State Attorney's office which is bogus. He was never a
14 special agent for the Florida State Attorney's office. He
15 has a card indicating that he's a special agent from the
16 Department of Justice issued by the U.S. Marshal Service
17 which is totally bogus, which they want to come and talk to
18 him. Unfortunately I told them he was dead, so that in and
19 of itself, carrying that, is a crime in and of itself, all
20 right.

21 The point and the fact is he beat his wife up, he
22 beat her up and everything else. That is violence. Aren't
23 we going to count wives? Are we going to count women?

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1 THE COURT: My point is it only becomes
2 relevant --

3 MR. LEWIS: It is relevant now because,
4 judge, everybody in this case is saying we don't care what
5 Nate said, we know that's bogus and we didn't believe any of
6 that. You can't do that. You can't do that.

7 THE COURT: I agree with you his view is
8 before the jury that he did this out of self-defense, but the
9 only way the character comes in to account is if Nate had
10 taken the stand, and he has a right to give to the jury what
11 his thought process was at the time of the killing. And if
12 he gets on and says I know this guy is a violent SOB and
13 that's what prompted me, and any other reasonable person in
14 my position would have acted as I did, then it becomes
15 relevant.

16 MR. LEWIS: Judge, no. He doesn't have to
17 take the stand to establish that. The tape in and of itself,
18 the evidence the prosecutor brought in. You can have
19 self-defense, judge, without the man taking the stand. He
20 can put it in his statement, he can say this is what
21 happened. What happened is that Fingerhut got into the
22 house, all right, and Fingerhut had every motive in the world
23 to get rid of Nate Jackson or to do something about him

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1 because --

2 THE COURT: Now that takes -- you have

3 to --

4 MR. LEWIS: I have motive and I have a
5 story.

6 THE COURT: Jim, Jim, one thing. Let me
7 stop you. You have to make a big assumption there that I
8 don't think there's any evidence of. Is there any evidence
9 that Fingerhut was aware of this liaison between --

10 MR. LEWIS: Oh, absolutely.

11 MR. CONSOLDANE: It's in the letters.

12 It's in the tape.

13 MR. LEWIS: It's in the telephone calls.

14 That's how she got beat up.

15 MR. CONSOLDANE: They haven't played it.

16 Maybe we should play it to the jury. It's in there. It's

17 marked as evidence. The jury is going to be able to read it.

18 We're going to tell them to read it.

19 MR. LEWIS: It's in there.

20 MR. WATKINS: Your Honor, I have Diana

21 Marchese waiting and she needs to be out of here.

22 MR. LEWIS: I can show you the excerpts,

23 judge. I can show you where within eight days of this or 10

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1 days where she got beat up because he found out because
2 somebody called him. Well, he knew that before as far as I'm
3 concerned. The letters were in his bedroom, for God sake.
4 He knew this. But the point is --

5 THE COURT: Well, that's in the record.

6 MR. WATKINS: Yeah, there's no question
7 that the guy, the guy, they had confrontation. There was
8 another man involved, there is no question about that. We're
9 not -- it is to the point.

10 MR. LEWIS: There was another man
11 involved. The point is she's divorced, she can be with any
12 man she wants.

13 MR. MORROW: Fine, argue it. Argue it.

14 MR. LEWIS: The point is --

15 THE COURT: Well, --

16 MR. LEWIS: -- I'll show you where she was
17 beat up and all of this.

18 MR. WATKINS: And she got two punches in.
19 That's the 27th of -- 29th of November letter where she got
20 two punches in in this.

21 THE COURT: Okay. Let's put a stop to
22 this.

23 MR. CONSOLDANE: Your Honor, we have two

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1 prongs to it, the one on the self-defense and also the one
2 that he opened the door, and I think that is more important
3 than anything. I will let -- I've made my objections enough
4 times.

5 THE COURT: Your objection is on the
6 record. I'm overruling that. If that is as important to the
7 court of appeals as it is to you, then I'm wrong on the
8 something, but I think that I'm correct and I think it's getting
9 too far afield here on the evidence as it is to this point.
10 The Rule 29 is overruled for the same reasons that appear on
11 the record before. Nothing was changed by the evidence put
12 on to vary that ruling.

13 You are going to put your rebuttal on?

14 MR. WATKINS: I've got them all out there.
15 They are waiting. We have three witnesses and then that's
16 it.

17 THE COURT: And then you folks have, I
18 think, a complete record here on all these points. This one
19 point we're just talking about, we've been over three times,
20 so there's a complete record that the court of appeals can
21 decide the issue with. You guys have done your job.

22 MR. LEWIS: Based on that, we did renew
23 our Rule 29, didn't we?

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11 MR. CONSOLDANE: Yes, yes, yes.

12 MR. LEWIS: Okay. All right.

13 THE COURT: Thank you.

14 (Whereupon, the proceedings in chambers
15 were concluded and the following proceedings occurred in open
16 court with the jury present.)

17 THE COURT: Good morning, folks. The
18 State has presented its case, the defendant has presented his
19 case, and the State is now going to call a few more witnesses
20 for what we call rebuttal evidence. That is an opportunity
21 for the State to bring forth witnesses to rebut something
22 that has been presented by the defense evidence.

23 As you know, the burden is upon the State to prove
24 this case beyond a reasonable doubt. Therefore, the State
25 has the opportunity to present rebuttal evidence as well as
26 giving the last argument in closing arguments because of the
27 burden of proof.

28 Mr. Watkins, are you ready to call your witness?

29 MR. WATKINS: Yes, Your Honor. Mr. Oliva.

30 (Whereupon, the oath was administered to
31 Mr. Carmen Oliva by the Court.)

32 * * *

33 WHEREUPON,

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MR. CARMEN OLIVA

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having been first duly sworn, was called as a witness and

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testified as follows:

4

DIRECT EXAMINATION

5

By Mr. Watkins

6

Q Good morning, Carmen.

7

A Good morning.

8

Q If you can, pull that microphone near you, then the

9

jury will be able to hear you. I think you speak fairly loud

10

so I don't think that would be a problem. It's important to

11

speak up.

12

A Sure.

13

Q Would you tell the jury your name, please?

14

A It's Carmen Oliva.

15

Q And where are you from, Carmen?

16

A New Castle, PA.

17

Q And you are a salesperson at the Preston Auto Mall?

18

A Yes, sir.

19

Q And would you tell the jury where that's located?

20

A That's on 3843 Youngstown Road, Warren, Ohio.

21

Q And how long have you been in business?

22

A I've been with the company nine years.

23

Q Okay. And how long have you been at the Warren

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1 officer or Warren auto mall?

2 A Five years October 1st.

3 Q And did there come a time in December, sometime

4 after December 11th, that you became aware that one of your

5 customers had been killed?

6 A Yes, I did.

7 Q And, in your own words, tell the jury how you became

8 aware of that.

9 A We heard it on the news.

10 MR. LEWIS: Judge, we're going to object

11 to that. What's the relevancy? I mean, he's a salesman.

12 MR. WATKINS: I'm going to tie it in.

13 A I said I heard it on the news --

14 MR. CONSOLDANE: Wait a minute.

15 A -- and that next morning I heard it from a

16 co-worker.

17 MR. CONSOLDANE: Carmen.

18 MR. LEWIS: Carmen, hang on.

19 THE COURT: Just one minute, sir. What's

20 your objection?

21 MR. LEWIS: The objection simply is,

22 judge, he's going to talk about what happened before

23 Mr. Fingerhut's death. That's what posing the relevancy of

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1 this is. It's not a story about what happened afterward or
2 anything else.

3 THE COURT: Well, I don't think that it
4 has to be. Part of the State's case here is in regard to the
5 automobile. We've gone over this out of the jury's hearing
6 on the purpose of the State calling this witness. The
7 relationship of time as to whether the defendant is required
8 to only put something that happened after this alleged
9 incident I think is incorrect. They have a right to pursue
10 the course that they're taking, okay?

11 MR. LEWIS: All right.

12 THE COURT: So the objection is overruled.

13 Q When you heard it on the news did you see a
14 photograph or a picture of the victim?

15 A Yes, I did.

16 Q And did you recognize the victim?

17 A Absolutely.

18 Q And how well did you know him?

19 A He was a great customer to me.

20 Q And was there something about the name that was
21 given on the TV that --

22 A I knew him by Mr. Roberts, period, as a customer.

23 That's what we called him.

1 Q And the picture of the deceased was what name that
2 person was going by on the TV?

3 A On the news? Fingerhut.

4 Q Okay. So the customer you described as a customer
5 you knew very well, you knew him as Mr. Roberts?

6 A Yes, sir.

7 Q And how many years did you know him?

8 A '98, '99, 2000, '01. Five years.

9 Q A little bit louder, please.

10 A Almost five years.

11 Q Okay. And how many cars did you negotiate with him?

12 A Four cars.

13 Q And would you tell the jury what cars they were?

14 A A '98 Sebring, a '99 300M, 2000 300M and 2001 300M.

15 Q And when you negotiated with him was Donna Roberts
16 with him?

17 A Never, not once.

18 Q And when the cars were purchased how was it
19 purchased, in whose name?

20 A Donna Roberts, period, only.

21 Q And that was pursuant to whose instructions?

22 A Excuse me?

23 Q Is that what Mr. Roberts told you, the way he wanted

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1 it?

2 A Sure.

3 Q Okay.

4 A He never signed one bill.

5 Q Okay. But he was the only person you dealt with
6 picking out the cars?

7 A He picked the car out and negotiated. He didn't
8 negotiate much. He wasn't that type of guy.

9 Q And after he would get these cars would you see him
10 very often?

11 A Absolutely.

12 Q And would you explain to the jury why you would see
13 him very often?

14 A We have a feature or benefit of our dealership where
15 you buy a car and you come in Monday through Saturday
16 anytime, you never have to pick the phone up or call, we have
17 a courtesy where we'll wash your car for you. If you buy a
18 \$500 car, you come in and we wash it for you. It's a
19 courtesy. That's a feature and benefit that Mr. Preston has
20 had for 14 years.

21 Mr. Roberts was very particular with his cars
22 obviously. You see he bought three 300Ms, named Motor Trend
23 car of the year. He loved the car. Got Mrs. Roberts

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1 whatever she wanted. He was the gentleman that would bring
2 the car in, all the cars, to get washed, cleaned and
3 serviced. In the five years that I've known him I seen Donna
4 Roberts maybe four times, and that was only to get her
5 signature on a contract, and from the time of delivery of
6 that vehicle when it went over the curb she never came in to
7 get it washed, to come to our dealership for service, and
8 that's it.

9 He was a great customer. He was a great guy. He's
10 very well missed.

11 MR. CONSOLDANE: Objection.

12 Q Carmen, would you please --

13 THE COURT: Just a minute. What's your
14 objection?

15 MR. CONSOLDANE: Your Honor, you told us
16 we can't get into Mr. Fingerhut's character and here he is,
17 Dennis is getting into it again right now.

18 A I'm talking about his character.

19 THE COURT: Just one moment.

20 A That's me. Excuse me if I can't -- judge, if you
21 don't want me --

22 THE COURT: No. Just one minute.

23 A I had a rapport. He wasn't just a customer. If you

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1 have a problem with me talking --

2 THE COURT: I have to sustain the

3 objection --

4 MR. WATKINS: Yeah. Carmen, --

5 THE COURT: -- because the character, the

6 Court has ruled, is not part of the case, it has no relevancy

7 to it. So don't give any opinion on that, please.

8 MR. CONSOLDANE: Your Honor, I would like

9 also an instruction to have the jury disregard any of those

10 comments. This is the second time that the State has done

11 this.

12 THE COURT: Ladies and gentlemen of the

13 jury, the character of a person by the rules of evidence

14 usually does not come in unless there is a specific reason

15 under the rules that it is relevant to the case. Whether

16 Mr. Fingerhut was an angel or a devil, this Court has ruled

17 under the evidence as it's been presented, is not something

18 for the jury to take into account. That's neither here nor

19 there as far as what you have to decide.

20 Now, there was some testimony that was given earlier

21 and I think someone expressed a certain view of the good

22 character of Mr. Fingerhut. That was not objected to at the

23 time or the Court -- I don't think it was objected to at the

1 time.

2 MR. CONSOLDANE: No, it wasn't, Your
3 Honor. I mean, we figured if the State wanted to get into it
4 we would get into his character also.

5 THE COURT: Okay. In any event, there's
6 been an objection to any further evidence in that regard and
7 the Court has ruled that the character of the deceased is not
8 part of the information this jury needs to make a decision.

9 You will be given instruction of law that covers all
10 necessary parts. So I am instructing you at this point in
11 time that any reference that has been made good or ill of the
12 character of the deceased is irrelevant, you are not to use
13 for any purpose. Please continue.

14 Q (By Mr. Watkins) Carmen, would you please tell the
15 jury, and listen to my question, how many times did you see
16 Mr. Fingerhut, or Mr. Roberts as you knew him, with the
17 silver car?

18 A Over 20 times, if not more.

19 Q And when he would bring the car in those 20 times
20 would you at times take him somewhere?

21 A Sure. We'd give him the courtesy of taking him back
22 to the business 99 percent of the time. We didn't make him
23 wait.

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1 Q. And with the red car, did you see him at times bring
2 the red car in?

3 A. Did I see him?

4 Q. Yes.

5 A. He was 99 percent the person coming in to our store.

6 Q. Yeah. My question is you saw him bring both cars
7 in?

8 A. Yes, both cars. Every car.

9 Q. And what were the last two cars that he purchased
10 from you, the years and the models, please, and their colors?

11 A. A 2000 --

12 MR. CONSOLDANE: Objection.

13 MR. LEWIS: He didn't purchase them.

14 Judge, he never --

15 THE COURT: Okay. Sustained. Redraft
16 your question.

17 MR. LEWIS: Jesus. Please. You know.

18 Q. When he negotiated with you for Donna Roberts to
19 come and sign for it, what were the last two cars?

20 A. Inferno red 2000; 2001 300M, silver mist, was the
21 last one.

22 Q. And that was a 2001 300M?

23 A. 2001.

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1 Q And how much did those cars cost?

2 A They had an MSRP of about 33,000.

3 Q And were those cars leased?

4 A Yes, sir.

5 Q And did you notice the keys that Mr. Fingerhut
6 personally had for the silver car?

7 A I didn't even have to see them, I describe them.

8 Q Just tell the jury what they looked like.

9 A He had a baseball, a little -- like a little thing
10 of a gym bag, he had a little metal ring, and he carried a
11 lot of keys.

12 Q Okay. I'm going to show you what's been marked
13 State's Exhibit 269. Do you recognize those keys?

14 A (Witness nods head affirmatively.)

15 Q Whose keys are they?

16 A Mr. Roberts'.

17 Q And approximately when was the last time you saw
18 him?

19 A He was in our dealership December 10th.

20 Q Did you see him that day?

21 A I said hello to him and greeted him, absolutely.

22 Q And when was the last time that you drove him after
23 he had brought his car in approximately?

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1 A I can't, I can't exactly give you -- I would say
2 approximately a month and a half, two months I personally
3 brought him to the Warren Greyhound station.

4 Q And that's where you would take him?

5 A I always take him there.

6 Q Thank you very much.

7 THE COURT: Cross.

8 MR. LEWIS: Judge, if I could approach.
9 Kelly, I want it on the record here. Just move over here a
10 little bit. Judge, just for a moment.

11 (Whereupon, the following proceedings
12 occurred at side bar outside the hearing of the jury.)

13 MR. LEWIS: Judge, in regard to the
14 earlier meeting with the Court, the prosecutor proffered what
15 he was going to have him introduce. He said he was going to
16 negotiate the sales of cars, that's all he was going to go
17 into. It is obvious he testified to a lot more than that,
18 identified keys, testified about the car washings, testified
19 about a lot of other things that were beyond the scope of
20 what the prosecutor proffered at that time. We would raise
21 an objection in regard to this and just indicate to the Court
22 that he didn't tell us in full detail exactly what he was
23 going to introduce. He prefaced it with he negotiated a

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1 couple sales of two cars. And obviously this witness is
2 going to be rather hostile towards me, there is no question
3 about it, he wants to talk on his own, so if it gets out of
4 hand I want the Court to caution him in regard to the
5 testimony. I need your keys to get in the back room.

6 THE COURT: The back room?

7 MR. LEWIS: I need the exhibits.

8 THE COURT: Objection is noted and I guess
9 it is an objection to the entire testimony. It's overruled.

10 (Whereupon, the side bar conference was
11 concluded.)

12 CROSS EXAMINATION OF MR. CARMEN OLIVA

13 By Mr. Lewis

14 Q Mr. Oliva, before we get started I got to ask you a
15 question. I had an investigator who was a fine gentleman, he
16 worked in Washington DC and he worked for my office. He has
17 since died. John Oliva. Are you any relation to John Oliva
18 in Girard?

19 A No, sir.

20 Q Not at all?

21 A Everybody asks me though, sir, if I'm related to the
22 Olivas in Girard. I'm from New Castle, PA and my family is
23 in Italy. My dad lives in Italy. My mother lives in New

1 Castle. But the five years I've established here they do ask
2 me that.

3 Q They do ask you?

4 A Yes, sir.

5 Q You would have been pretty well off if you would
6 have been related to him.

7 A Excuse me?

8 Q I say you would have been well off if you had been
9 related to him I think.

10 A No relation.

11 Q Carmen, I'm not going to fight with you, okay?

12 A Okay.

13 Q I know you feel for Mr. Fingerhut. Okay. I'm not
14 going to fight with you, all right?

15 A No, sir. No problem.

16 Q Okay?

17 A Sure.

18 Q All right. You knew -- it's Mr. Roberts?

19 A Yes, sir.

20 Q And you knew him for approximately those five years?

21 A Approximately five years.

22 Q He came into Preston and you are a -- are you a
23 salesman, a salesman, I mean just general, like they have

1 BMW, they have Chrysler, --

2 A I do it all.

3 Q -- they have Jeep, they have all that?

4 A I do Chrysler, Jeep, BMW, Plymouth.

5 Q Okay. All right. And did you ever refer to

6 Mr. Fingerhut as Mr. Roberts in those five years?

7 A Did I refer?

8 Q Yeah, like "Mr. Roberts, how are you today? Good to
9 see you. I got some great cars here."

10 A That's the only -- that's how I know him,
11 Mr. Roberts, period.

12 Q Yeah, Mr. Roberts. He never told you his name was
13 really Fingerhut?

14 A No.

15 Q He never did in five years?

16 A He didn't tell me his last name was Fingerhut. I
17 called him Mr. Roberts.

18 Q Well, how did you get the idea he was Mr. Roberts?

19 A That's what he told me to call him by.

20 Q He told you to call him by Mr. Roberts?

21 A Didn't tell me, didn't tell me.

22 Q Okay. Don't get --

23 A I'm just saying.

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1 Q Can you tell me how it came about that --

2 A It's respect, it's out of respect. I know him to

3 call him Mr. Roberts.

4 Q Okay.

5 A I'm swearing to the -- judge, I'm just answering as
6 best I could.

7 Q Okay, Carmen, I understand that, okay, and I
8 understand your response, okay, and I told you we're not
9 going to fight, okay?

10 A No. Sir, I'm not going to fight.

11 Q All I'm asking --

12 A You're asking me --

13 Q Wait, wait, wait, wait, wait. All I'm asking you is
14 how is it that you came about to call him Mr. Roberts, do you
15 recall how it happened?

16 A Our dealership in Warren, Ohio knows to call him
17 Mr. Roberts.

18 Q Okay.

19 A I was aware of Fingerhut from the news --

20 Q I understand.

21 A -- that following day after his death.

22 Q Okay. Good enough, good enough answer. Okay. So
23 the dealership knew him as Mr. Roberts?

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1 A Yes, sir.

2 Q Okay. The first car you negotiated with him, for

3 him -- well, wait, negotiated to buy. When we say

4 negotiation, that's where we argue about price, right? Pick

5 out the car and argue about price, is that what we are going

6 to say is negotiate?

7 A Yeah.

8 Q Okay. And the first time did you ask him -- do you

9 do any of the paperwork at all, Carmen, let me ask you, do

10 you do any of the paperwork, sign the contract?

11 A Excuse me?

12 Q Do you as a salesman -- okay, I know how dealerships

13 work. You have a salesman, usually a couple salesmen on the

14 floor, okay.

15 A Yeah.

16 Q And when it comes to signing the actual contracts,

17 some small dealerships the salesman actually goes in, does

18 the paperwork and has him sign the agreement.

19 A Uh-huh.

20 Q Do you do that and did you do that?

21 A (Shaking head negatively.)

22 Q Okay. So you turned him over to somebody else, who

23 would be?

1 A Right. That would be our finance manager.

2 Q The finance manager. Okay?

3 A The salesman is not allowed to touch any contract.

4 Q Not allowed to touch any contract?

5 A No, we don't.

6 Q So you saw -- that's bad English, saw under
7 contract. You didn't see any contracts, right?

8 A Did I see it?

9 Q Yeah. And why?

10 A My business manager handles the final contract and
11 the titling.

12 Q Okay. And title?

13 A And so forth, yes, sir.

14 Q You know a gentleman by the name of Brad Kane?

15 A Absolutely. He's a personal friend of mine from New
16 Castle.

17 Q Okay. He's a personal friend, but does he also work
18 at --

19 A Preston Auto Mall, yes.

20 Q Preston Auto Mall. Okay. And does he do paperwork
21 in regard to people signing and doing credit checks and
22 getting registrations for motor vehicles?

23 A Yes.

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1 Q Okay. All right. And in regard to this, did you
2 ever see any of the contracts that were actually signed for
3 the lease of the motor vehicles?

4 A Did I see them?

5 Q Yeah, did you ever see them?

6 A Yeah.

7 Q Okay. And whose name were they in?

8 A Donna Roberts.

9 Q Okay. Did Mr. Fingerhut ever tell you why they were
10 in the name of Donna Roberts?

11 A Never.

12 Q Okay. Did you ever ask?

13 A Never.

14 Q Okay. I'll show you what's been labeled as Defense
15 Exhibit F.

16 A Okay.

17 Q Have you ever seen a document like that before?

18 A It's a credit app.

19 Q A credit app, right, exactly. Okay. And whose name
20 is on the credit app?

21 A Donna M. Roberts.

22 Q Okay. Do you see a Mr. Robert Roberts on there by
23 any chance? Is there a Mr. Robert Roberts' name on there,

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1 the credit app?

2 A No, sir.

3 Q Is there a Robert Fingerhut on there?

4 A No, sir.

5 Q Okay. And what was your understanding, do you know
6 what Mr. Fingerhut -- or Mr. Roberts, I'm sorry, Mr. Roberts
7 did, what his business was?

8 A Sure. He was an owner and an operator of two busing
9 operations.

10 Q He was?

11 A Yes, he was, Youngstown and Warren.

12 Q Okay. What does the credit app say that Donna
13 Roberts does?

14 A Owner/operator.

15 Q Okay. So Mr. Fingerhut told you he was the
16 owner/operator. You don't know if that is true?

17 A Excuse me?

18 Q Did you know if that was true or not?

19 A If I knew what was true?

20 Q That he was the owner/operator.

21 A Yeah, I know it's true.

22 Q You know it's true?

23 A Yes, I do.

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1 Q Okay. And you never knew for five years that his
2 name was Fingerhut?

3 A No, sir. I won't lie to you.

4 Q Okay. All right.

5 A He was an owner and operator though. Physically I
6 was in his business seeing him run this place behind the
7 glass, behind the counter, okay?

8 Q Okay. Well, all right. Well, people can be behind
9 a counter and they may not own the business.

10 A Sir, you're asking me to answer you. I'm telling
11 you I can describe the glass, the counter, everything --

12 Q I understand you can describe it.

13 A -- to you physically.

14 Q You just believed he was the owner/operator, right?

15 A No.

16 Q You believed that, right?

17 A Yes, I do.

18 Q Okay. And all of the leases, the names on the
19 leases ended up being Donna Roberts, correct?

20 A Yeah.

21 Q Okay. She's the one that actually came in and
22 signed up for the motor vehicles, right?

23 A That's about all she did.

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1 Q That's about all she did?

2 A Yeah.

3 Q You didn't like her, huh?

4 A I never said that. You said that. I thought she
5 was a good person. I liked her.

6 Q Okay. But that's all she did?

7 A You said I didn't like her.

8 Q No. I'll retract that.

9 A Yes, sir.

10 Q What you're telling us --

11 A I did like her.

12 Q What you really want to tell me is that Mr. Roberts
13 was the guy always there and you very rarely, only maybe
14 once, you ever saw Donna Roberts?

15 A I didn't say once.

16 Q Okay. Can you tell us how many times you saw Donna
17 Roberts?

18 A Maybe four times. I thought she was a nice person.

19 Q Okay. And did Mr. Roberts say that that was his
20 wife?

21 A Yes, absolutely.

22 Q Okay. And you're absolutely sure then or you
23 believe that they were married?

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1 A Yes, sir.

2 Q And you --

3 A He would do anything for her.

4 Q -- weren't aware of the fact that they were
5 divorced?

6 A Excuse me?

7 Q You weren't aware of the fact they were divorced?

8 A No, I didn't know that, sir.

9 Q When Mr. Fingerhut came in, you saw him on at least
10 20 occasions, right?

11 A If not better.

12 Q Okay, if not better. And was he -- did he wear a
13 lot of jewelry? Did you ever see his jewelry?

14 A He wore bracelets.

15 Q Okay. What kind of bracelets, do you recall?

16 A He had link, nugget, Turkish, a lot of, a lot of
17 like link, flat gold I mean.

18 Q Platinum gold?

19 A Platinum gold? Gold, it was gold.

20 Q Okay. How about necklaces, did he have a couple of
21 gold --

22 A I couldn't see no necklaces on him, no. He was

23 always in a jersey and I couldn't see, I mean, I didn't know

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1 if he had one under there or not.

2 Q Okay. So, in essence, Donna Roberts was the one
3 that always the leases went into, right, was the owner of the
4 car?

5 A Yes, sir.

6 Q Okay. And you knew Mr. Fingerhut for five years but
7 you knew him as Mr. Roberts, correct?

8 A Yeah.

9 Q And he never told you any differently?

10 A No, sir.

11 THE COURT: Any redirect?

12 MR. WATKINS: No, Your Honor. We're
13 satisfied.

14 THE COURT: Carmen, thank you very much.
15 You're excused.

16 A Okay, sir.

17 MR. WATKINS: Barry.

18 (Whereupon, the oath was administered to
19 Mr. Barry Ricker by the Court.)

20 * * *

21 WHEREUPON,

22 MR. BARRY RICKER

23 having been first duly sworn, was called as a witness and

1 testified as follows:

2 DIRECT EXAMINATION

3 By Mr. Watkins

4 Q Good morning, Barry.

5 A Good morning.

6 Q Would you give your full name for the jury, please?

7 A Barry Gerald Ricker.

8 Q And where are you employed?

9 A I'm employed at Preston Auto Mall here in Warren,
10 Ohio.

11 Q And would you tell the jury how long you've been
12 employed there?

13 A I've been employed there a little over five years.

14 Q And what position do you hold?

15 A Service advisor I am.

16 Q And would you tell the jury what you do as a service
17 advisor?

18 A We're the people who accept the phone calls,
19 schedule appointments, get cars repaired, call customers to
20 let them know the repairs that need to be done on the cars
21 and also inform them when they're done, and the associated
22 jobs with that, arranging transportation and things like
23 that.

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1 Q Now, did there come a time that you would service a
2 car that was -- or cars owned by Donna Roberts?

3 A Correct.

4 Q And did you also deal with a male subject dealing
5 with those cars?

6 A Uh-huh. From day one when Mr. Fingerhut, who I had
7 always known as Mr. Roberts, when Mr. Fingerhut would bring
8 vehicles by or call for appointments I always assumed that he
9 was Mr. Roberts. I had never met Mrs. Roberts before and I
10 had always dealt with Mr. Fingerhut as far as the repairs for
11 the two automobiles that he would bring in.

12 Q And how would he appear, how would he dress and how
13 big a person was he?

14 A A casual man. He's probably a little bit shorter
15 than I am, maybe five 10. He's probably close to maybe 185,
16 190, maybe a little bit heavier than that. Casual dresser,
17 he would dress in usually blue jeans and athletic coats,
18 things like that.

19 Q And when the car would be brought in, or let's, for
20 example, do you recall what the last two vehicles that were
21 owned at the same time that Mr. Roberts had?

22 A Yeah, he had two Chrysler 300Ms, one was silver that
23 he would bring in for service and the other was reddish, like

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1 a cranberry color.

2 Q And would he or Donna Roberts usually bring the
3 vehicles in for service?

4 A It was always Mr. Fingerhut, I guess I'll call him,
5 yes. Again, I know him as Mr. Roberts, but he would always
6 bring the cars in. I never met Donna Roberts until one time
7 that she came and picked the vehicle up on one occasion. The
8 rest of the time it was always Mr. Fingerhut.

9 Q Okay. Now, when you would service a vehicle, I take
10 it because they are relatively new cars, they are warrantied?

11 A Uh-huh.

12 Q And at times there would be service that wouldn't be
13 charged?

14 A That's correct. He had purchased for both vehicles
15 what we call certified maintenance. At the time of purchase
16 you are eligible to purchase what's called certified
17 maintenance which pays for oil changes and tire rotations for
18 a certain period of time, anywhere from one year up to three
19 years, and those are all prepaid. So when a customer would
20 come to pick the vehicle up, in Mr. Fingerhut's case, he
21 would only have to sign the paperwork and then he would be
22 gone, there would be no transaction of money, unless there
23 was a repair that was done on the car that he asked to have

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1 something special done like a cleaning, a detail or something
2 like that.

3 Q Now, if there were a charge would he have to pay for
4 it?

5 A That's correct, he would, yeah, and we would --
6 whenever he would drop the automobile off we would make
7 arrangements to get him transportation back to his place of
8 work, either we would run him back with our shuttle service
9 or one of the sales department would run him back. And then
10 we would also, if necessary, come pick him up after the
11 repairs were done, and that's when the transaction was done
12 as far as him signing the paperwork and taking care of any
13 bill, if there was one.

14 Q And where was his place of employment?

15 A He worked downtown in Warren at the bus station.

16 Q And would you see him sign or charge, sign documents
17 or sign charge receipts?

18 A Yeah. We would escort him over to the -- and it's
19 the usual custom with all our customers, we escort them over
20 to the cashier's counter, explain to them any charges that
21 are there, ask if there is any questions, make sure they get
22 their keys and their paperwork and make sure everything is
23 okay. So I would escort him over to the counter and make

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1 sure the paperwork and keys and everything were processed
2 there, and if he had no questions they would just take off.

3 Q I'm going to hand you what's been marked as State's
4 Exhibit 398, and you have records with you?

5 A Yes, sir.

6 Q The records that are in your custody and care and
7 ordinarily kept in the course of your business at Preston?

8 A That's correct.

9 Q And, in fact, we met yesterday and we made copies.

10 A Uh-huh.

11 Q 398-A through 398-N.

12 A In a quick glance that looks like that's the red
13 vehicle.

14 Q Yeah.

15 A Yes, uh-huh.

16 Q Now, would you tell the jury whether or not those
17 are true and accurate copies of your records?

18 A Repair orders written up. This is the actual
19 accounting copies but the same copy is given to the customer
20 when they come pick the vehicle up. The other paperwork
21 that's here is information that we need at the dealership as
22 in we run what's called a dial, which gives all the basic
23 information on the car, including warranty and things like

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1 that, so we know whether a repair is a warranty item or a
2 customer pay item. And then this, yeah, this is the back of
3 the repair order where the technicians make comments and
4 their time is flagged, things like that, but this is typical
5 copies of a standard repair.

6 Q And that's the red vehicle?

7 A This is the red one, yes.

8 Q And that's the 2000 300M?

9 A That is correct.

10 Q And that's the vehicle that Donna Roberts had longer
11 in time?

12 A Uh-huh, correct.

13 Q And in those documents are there signatures of
14 Mr. Roberts?

15 A Mr. Roberts as I knew him, Mr. Fingerhut, yes. He
16 would come in here and his signature was very, very
17 discernible as in it's very, very easy to tell his signature.

18 Q And do you have any of Donna Roberts in there?

19 A In the file for the red 300M, no, I do not.

20 Q And, therefore, all the signatures that you have in
21 that file is Mr. Fingerhut?

22 A Would be Mr. Fingerhut's signature, correct.

23 Q Which you knew as Mr. Roberts?

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1 A Correct.

2 Q Okay. By the way, can you read his signature?

3 A If I didn't know that was him I wouldn't have been
4 able to read it, no.

5 Q That is you saw him do it?

6 A Correct. Oh, yes.

7 Q 399, that's the silver car?

8 A Uh-huh. Again, same situation, copies of front and
9 back of the repair orders, I'm sure they're in here. They
10 have the technicians' comments and things like that,

11 including there's a special order part that we had ordered
12 for the vehicle. The last time Mr. Fingerhut, slash

13 Mr. Roberts, was in the store he had his vehicle in here, we

14 had to order a part for it, so there's even a copy of the

15 special order slip that's there and his distinctive signature
16 at the bottom.

17 Q And when was the last time that you saw him write
18 that signature?

19 A I saw him write the signature, that would have been
20 December the 10th, which was Monday, December the 10th.

21 Q 2001?

22 A Correct.

23 Q And what time in the morning?

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1 A He usually like clockwork had his vehicle there
2 between 8:00 and 8:30 in the morning, and according to the
3 repair order here it actually shows the time that the repair
4 order was written and I wrote it as he was there and it's
5 8:11.

6 Q And what color was that vehicle?

7 A This would have been the silver car.

8 Q And what time, if you know, did he pick up the
9 vehicle?

10 A His pickup time was also just about the same time,
11 anywhere between 5:00 and 6:00 o'clock in the afternoon. And
12 again, we would contract him, I would contact him and let him
13 know that the car was done and ask him at that time if he
14 needed transportation. If he did not, he could find his own
15 way up. If he did need transportation we would send somebody
16 down to pick him up.

17 Q Do you recall seeing him pick up the car?

18 A This particular day? I don't actually remember him
19 actually picking the vehicle up. With the volume of
20 customers coming through at the shop, especially between the
21 hours of 5:00 and 6:00, there's a lot of times they'll come
22 in -- and Mr. Fingerhut, Mr. Roberts, was familiar enough
23 with the routine there that he knew that if he came to the

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1 counter and there was no one there that his paperwork and
2 keys would always be with the cashier.

3 Q Now, you indicate that there were other times that
4 he brought that silver car in?

5 A Correct.

6 Q And there was one occasion that Donna Roberts
7 brought it in?

8 A Uh-huh, that I remembered distinctly after going
9 over the repair orders on this because the signature is
10 different. There was one time I recall informing him of the
11 fact that his vehicle was done and it was ready for pick up
12 and that he said, "I'm probably going to end up sending Donna
13 to pick the car up," he didn't come pick the vehicle up, and
14 the signature is different.

15 Q And that, that is one of the --

16 A That would actually have been this. That's all,
17 that's all that repair order there, and that would have been
18 the time.

19 Q And that's 399D?

20 A Uh-huh. And that would have been sometime in I
21 think in October.

22 Q In August. 399D?

23 A In August. Okay. Well, it's actually -- there's

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1 the --

2 Q Oh, I'm sorry.

3 A The date of the repair. This is when the car went
4 into service, this is the date of the repair, so it would
5 have been October 30th.

6 Q But take a look at this.

7 A Oh, there it is down there. August 16th. I stand
8 corrected.

9 Q Okay. Now, I take it that these documents, which
10 I'll indicate you have looked through, are 399A through 399H
11 and they're all -- J, okay?

12 A Okay.

13 Q They're all accurate copies and complete
14 reproductions of your original records, is that correct?

15 A That's correct.

16 Q Now, when a customer would come in you would deal
17 with that customer for service on the vehicle, oil change,
18 part, whatever it is?

19 A Uh-huh.

20 Q You would be personally dealing with the customer?

21 A Correct.

22 Q Would there be times that customers could go and get
23 their car washed from the sales person where you wouldn't see

1 the customer?

2 A One of the perks that we offer as far as buying a
3 vehicle at Preston Auto Mall is we offer free lifetime car
4 washes for as long as you own the car and instruct customers
5 to let them know that any time they would like to have the
6 car washed they just come to the dealership and go to their
7 salesman and turn the keys over to their salesman and their
8 salesman takes the vehicle back and gets it washed.

9 Q So many times the salesman would take the car and
10 get it washed, you wouldn't even know the customer was there?

11 A I wouldn't even know he was there. Or he could come
12 walking through the shop and say hello to me on his way
13 through and then go get his car washed.

14 Q Thank you very much.

15 THE COURT: Mr. Lewis.

16 CROSS EXAMINATION OF MR. BARRY RICKER

17 By Mr. Lewis

18 Q Barry, how you doing?

19 A Good. How are you today?

20 Q It's almost time for me to bring my car in, isn't
21 it?

22 A Yes, it is.

23 Q You also knew Mr. Fingerhut as Mr. Roberts?

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1 A That's correct.

2 Q Okay. And this is for a period of almost what, five
3 years or something to that effect?

4 A Well, his particular cars that I dealt with him,
5 probably a period of about two years.

6 Q About two years?

7 A The two vehicles that he owned were both 2000, one
8 was a little bit older than the other, but it had been a
9 period of approximately two years.

10 Q Okay. And when he would come in, and of course
11 Preston wants to take care of its customers and make
12 everybody happy. On an economic downturn the maintenance can
13 get you over the hump, right?

14 A Uh-huh.

15 Q He was referred to as Mr. Roberts?

16 A Yes. The reason being is I would take his
17 information as far as what he would want done on the car and
18 then pull the car around for service, around to the service
19 line, bring his car information inside, as in car information
20 being the vehicle ID number and the number of miles on the
21 car. I punch the numbers into the computer and with both
22 cars it would come up under Donna Roberts, so I made an
23 assumption from his first visit there that he was

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1 Mr. Roberts. And any correspondence, as in any phone
2 conversations that I had with him, if I had to call down to
3 the bus station to let him know his car was done, I would ask
4 for Mr. Roberts and only on one occasion did someone tell me
5 there's no Mr. Roberts here. The rest of the time they all
6 understood the fact that I didn't know his actual first name.
7 I did not know his first name until after the fact here.

8 Q Okay. So you knew him as Mr. Roberts?

9 A I knew him as Mr. Roberts.

10 Q Not the classic Mr. Roberts in the movie but as
11 Mr. Roberts?

12 A Uh-huh.

13 Q Incidentally, all of the bills that you have and
14 you've identified here, that 399A through -- A through -- oh,
15 okay, they're out of order? Okay. All of those actually are
16 in the name of Donna Roberts, are they not?

17 A Correct, yes, every one.

18 Q And why would that be, why would they put it in her
19 name?

20 A Why would they put it in Donna's name?

21 Q Yeah.

22 A That's pretty much -- I have no idea why they would
23 do that back there in service, whether it's titled in her

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1 name because she's the actual owner or whatever reason it's
2 titled in, both cars were titled in her name. Back there in
3 the service department we're counting on the fact that the
4 paperwork up front is done properly as far as it's entered
5 into the computer that this is a vehicle that's owned by
6 Donna Roberts.

7 Q Okay. Let me ask you a question.

8 A Sure.

9 Q If somebody comes in, if I decide my good friend
10 Tony over here, we're not married, and I say what the heck, I
11 got a wonderful BMW, I'm going to take it in and have it
12 repaired, and I take it to Preston Chrysler, are you going to
13 even check to find out if I have the authority to bring the
14 motor vehicle in or if I'm the owner or anything?

15 A I have many occasions, especially with the BMW
16 customers in fact, that they never bring the cars in. They
17 have either secretaries or assistants or something like that
18 bring their automobiles in. So a lot of times, and
19 especially with the BMWs, I never get to meet the owners of
20 the car.

21 Q So somebody else can own it and someone else can
22 bring it in, it doesn't mean the person that brings it in
23 owns the car or anything else?

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1 A Correct. Correct.

2 Q In fact, they could have stolen it and they just
3 want to come down and get that free perk and get that thing
4 washed so they can get out of town in a nice car, right?

5 A Possible.

6 Q Sure, it's possible. But if somebody does come in
7 and say, for instance, they don't want to pay the bill and it
8 actually turns out they're not the owner of the vehicle, the
9 dealership has an option, don't they, in regard to that? Do
10 you know how that works?

11 A As far as what?

12 Q Well, when you take a car in and you put the
13 maintenance and the work and the labor and everything else,
14 you have a lien against that car, correct?

15 A Correct.

16 Q And that lien is only against that car, it only
17 works against the owner of the vehicle, right?

18 A Correct, uh-huh.

19 Q It doesn't work against my friend Tony, my friend
20 Dennis or anybody else that brings that car in, right?

21 A Uh-huh, correct.

22 Q It goes against the owner?

23 A Uh-huh.

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1 Q And that's the one you look for payment from, right?

2 A Correct.

3 Q And as long as you have that car you got a good
4 chance of getting payment because they don't get it back,
5 right, until it's paid?

6 A Uh-huh.

7 Q All right. The same would apply for -- this is the
8 silver car. As a matter of fact, I'll tell you what, when

9 people come in, or let's say, for instance, a car is sold or
10 leased from Preston and the keys are in the car and you're

11 coming down and you're picking up your brand new vehicle and

12 the salesman or Carmen comes down and says this is it, baby,

13 here's your car, they give the keys -- do they ever give the

14 keys -- they give the keys to the owner or the lessee of the
15 vehicle, right?

16 A Correct.

17 Q Okay. So if Tony leased the vehicle and I said,

18 "Well, I'm coming down, I'm going to pick up the car," or

19 whatever, you wouldn't do that, you would give it to the

20 owner?

21 A On a sale, yes.

22 Q He can give the keys, if he wants, to anybody else,

23 right?

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1 A Uh-huh.

2 Q Okay. But the keys belong with the car and the car
3 belongs to the owner, right?

4 A Right.

5 Q Or the lessee. Okay. All right. On the occasions
6 you saw him in the last two years, --

7 A Uh-huh.

8 Q -- when you say he's pretty casually dressed and
9 everything else, even though he's casually dressed and maybe
10 wearing some sports things, did you ever notice his jewelry?

11 A He would on -- I honestly don't remember any
12 specifics of that at all because we deal with, I personally
13 deal with probably 25 to 30 different customers a day, so
14 when it comes down to individual attire and things like that
15 I really, I must admit, I don't recall him wearing anything
16 specific.

17 Q Okay. So the most you remember is he's a casual, he
18 was a casual dresser?

19 A Very casual dresser, very sports more oriented
20 person because he would sometimes have a sports jacket on and
21 we would talk sports, things like that.

22 Q Okay. And you would see him -- oh, let me get back
23 to this before I forget. On 398A through -- gee, that's a

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1 lot of maintenance, you guys are doing all right -- N, that's
2 on the red car, all those are in the name of Donna Roberts,
3 right, as the owner?

4 A Correct, uh-huh.

5 Q Okay. And would you -- when you said you saw him
6 sign, as Mr. Watkins indicated, you saw him sign and put his
7 signature on there.

8 A Uh-huh.

9 Q And you said it's a very distinctive signature,
10 right?

11 A Uh-huh.

12 Q It's a scribble really is what it kind of boils down
13 to, right?

14 A Uh-huh.

15 Q So you thought that was Mr. Roberts' signature, in
16 other words he was signing Robert Roberts?

17 A He was -- yes. And he was signing his name,
18 actually not signing Donna's name, he would always sign what
19 I assumed to look at was his name whenever he picked the
20 vehicles up.

21 Q All right. So that scribble, as far as you're
22 concerned, is Roberts?

23 A * * Uh-huh.

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1 Q It's not Fingerhut, right?

2 A It could be anything.

3 Q It could be anything, that's the point. Yeah,

4 that's the point. But you were under the impression for two

5 years that he was Mr. Roberts, you called him Mr. Roberts,

6 right?

7 A Uh-huh, and he answered to that, too.

8 Q And he answered to that. And he never told you

9 otherwise?

10 A Not at all.

11 Q Thanks very much, Barry.

12 THE COURT: Any redirect?

13 MR. WATKINS: No, Your Honor. We thank
14 the witness. Thank you, Barry.

15 THE COURT: Thank you very much, sir.

16 MR. WATKINS: Call now Diana Marchese.

17 THE COURT: Ms. Marchese, please come
18 around here and raise your right hand to be sworn. Good
19 morning.

20 MS. MARCHESE: Good morning.

21 (Whereupon, the oath was administered to
22 Ms. Diana Marchese by the Court.)

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* * *

1 WHEREUPON,

2 MS. DIANA MARCHESE

3 having been first duly sworn, was called as a witness and
4 testified as follows:

5 DIRECT EXAMINATION

6 By Mr. Watkins

7 Q Good morning, Diana.

8 A Good morning.

9 Q Would you please tell the jury your name and what
10 you do?

11 A I'm Diana Marchese and I'm the Trumbull County
12 recorder.

13 Q And how long have you been the elected recorder for
14 the county?

15 A I'm in my third term.

16 Q And would you tell the jury briefly what you do?

17 A Okay. The recorder's office records land documents
18 such as your deeds and mortgages, powers of attorneys, zoning
19 records, things concerning the land, and we also do military
20 discharges.

21 Q And so you would have deeds and mortgages in your
22 record room?

23 A Yes.

1 Q And did I request of you to get mortgages on three
2 particular properties?

3 A Yes, you did.

4 Q In the name of Donna M. Roberts?

5 A Yes.

6 Q And those properties were [REDACTED]

7 both in Warren?

8 A Yes.

9 Q And 254 Fonderlac in Howland?

10 A Yes.

11 Q And were you able to find deeds and mortgages on
12 those properties?

13 A Yes.

14 Q And would you tell the jury, if you could, what
15 mortgage was on the property at Washington as of December
16 11th, 2002?

17 A I'd have to look for it.

18 Q Yeah. Would you, please?

19 A The Washington Street property had a mortgage of
20 \$29,800 and that was recorded July 16th, 2001.

21 Q And the [REDACTED] property in the name of
22 Donna Roberts?

23 A That had a mortgage of \$13,900 and that was recorded

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1 on July 13th, 2001.

2 Q And, finally, 254 Fonderlac?

3 A The Fonderlac property had one mortgage that was
4 \$31,200 and then there was a second one that was for \$75,000.

5 Q So the total mortgages on the Fonderlac property was
6 what?

7 A 75,000 plus 31,200, so what, 101,200.

8 Q In a mortgage, in mortgages?

9 A Yes.

10 Q What companies had the mortgages, do you know?

11 A On the Fonderlac or all of them?

12 Q On Fonderlac.

13 A Metropolitan Savings Bank of Ohio had the 31,200 and
14 First Deposit National Bank had the 75,000. No, I'm sorry,
15 that was the 31,200. Here's another one. There was one for
16 80,000 also. The Metropolitan was 80,000. That was March
17 13th, 1995. That was the oldest one. And the 31,200 was
18 with First Deposit and First Union National Bank of Delaware
19 had the \$75,000 one. So there was an additional \$80,000 I
20 had failed to tell you about.

21 Q So the total mortgage would be?

22 A About \$181,200.

23 Q In mortgages?

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1 A In mortgages.

2 Q And that's of December 11th, 2001?

3 A Prior to, yes. These were all before then.

4 Q I'm going to hand you 401 -- 400, 401 and 402, and I
5 believe these are certified copies by you of what you just
6 testified to.

7 A Okay.

8 Q I'm going to hand you what's been marked as State's
9 Exhibit 401.

10 A Okay.

11 Q And, if you could, please indicate that they are the
12 records that you verify as belonging to the three residences?

13 A This is a deed and it's -- Donna Roberts owns the
14 property, this is when she obtained the property, and this is
15 for Washington, this is the [REDACTED] And this is the
16 mortgage.

17 MR. CONSOLDANE: Dennis, I can't see what
18 she's saying when you're standing in front of her.

19 A I'm sorry. This is the deed to the property at [REDACTED]
20 [REDACTED] and then there's a mortgage. This one is from
21 Sky Bank. And this is the [REDACTED] one. And this is
22 the deed to the [REDACTED] when she sold the property and
23 this is the satisfaction of mortgage.

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1 Q Which was after December 11th?

2 A That was in May of 2002, the satisfaction was, and
3 that means it was paid off.

4 Q That means the mortgage was paid off?

5 A Yes.

6 Q And that's State's Exhibit 400?

7 A 400, yes.

8 Q Which would include 400A through 400B. Now I will
9 hand you 401, and that would be 401A to 401C, and would you
10 indicate whether or not they are the records you've testified
11 about the [REDACTED] home, [REDACTED] home owned by Donna
12 Roberts?

13 A This is the Olive, [REDACTED].

14 Q And that would include the deed and the mortgage?

15 A This is the deed and the mortgage follows, and that
16 was July of 2001 for both of them, July 13th.

17 Q And this would be 402, which would be the Fonderlac
18 property?

19 A Yes, this is the deed when she obtained the property
20 and this is one mortgage, the Metropolitan one, for 80,000,
21 the First Deposit Bank for 31,200, and the \$75,000 one from
22 First Union National Bank of Delaware. Did you want the
23 dates?

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1 Q No, that's all right. I have no further questions.

2 CROSS EXAMINATION OF MS. DIANA MARCHESE

3 By Mr. Consoldane

4 Q Hi.

5 A Hi, Tony.

6 Q Good. How are you today?

7 A Good, thank you.

8 Q Just a couple quick questions.

9 A Uh-huh.

10 Q On any of these mortgages that you've just testified

11 to, is there anything on those papers that would indicate

12 whether those are an open-end type of mortgage, you know what

13 I mean, like a home equity loan where you can draw against

14 it? Is there anything on there that would tell us that?

15 A Well, usually the document, the mortgage, it will

16 say if it's an open-end mortgage, but that's not something we

17 really pay attention to when we record them. That's not --

18 Q That's not on there?

19 A -- a factor for us.

20 Q Okay.

21 A It would say on the mortgage. Like if it's an

22 open-end mortgage it would say at the beginning of the

23 mortgage.

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1 Q So you really can't tell whether these are home
2 equity loans or whether they're just straight mortgages?

3 A Well, I couldn't tell you that.

4 Q Okay. And also --

5 A But usually when it follows the deed it is on the
6 property so it's not an equity loan.

7 Q I'm sorry?

8 A Well, if the deed is recorded and then the mortgage
9 immediately follows it, --

10 Q Yes.

11 A -- then that's usually, because it's on the property
12 that was just purchased and it's to pay for that property.

13 Q Sure, I can understand that, but there's nothing
14 there that -- those other mortgages that came by, there's no
15 way to indicate, there's nothing -- you can't tell the jury
16 that those are not home equity loans or that they are home
17 equity loans, you can't tell me either way?

18 A No. That's not something that my office looks for
19 and it's not something we --

20 Q And also you can't tell by what documents you have
21 there how much money has been paid on those mortgages?

22 A No.

23 Q Okay.

1 A Other than the satisfaction shows that it was paid
2 off.

3 Q Yeah, when they pay it off in full they issue a
4 satisfaction.

5 A Yes.

6 Q And have you had trouble with banks over there not
7 coming in and satisfying mortgages after they've been paid?

8 A There's a new law out that they have I believe 90
9 days, that they have to record a satisfaction now within 90
10 days, but we don't have that problem. Sometimes we have
11 someone call and want to know if their mortgage was satisfied
12 and we tell them yes or no according to the record.

13 Q But there has been problems in the past with that,
14 that's why they passed the law?

15 A Right. They -- yes, because they probably weren't
16 doing them in a timely fashion.

17 Q The bank is real happy to put the mortgage on but
18 they were real reluctant to take it off?

19 A Take them off, yeah.

20 Q But going back, my point is that even though there
21 is an \$80,000 mortgage, \$75,000 could have been paid on that
22 mortgage, there was no way you could tell that?

23 A No.

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1 Q Okay. The only way that you can tell is after it's
2 paid in full when they release the mortgage?

3 A Right, yes.

4 Q Okay. One, one final question. On any of the
5 paperwork that you have there does anybody's name appear on
6 there as the owner of any of that real estate other than
7 Donna Roberts?

8 A No.

9 Q Okay.

10 A Other than when she sold it, I mean, you know.

11 Q Right.

12 A But no, it was just her name alone. And that's what
13 I searched under for these records was for under her name
14 only.

15 Q And did Robert Fingerhut own any real estate over
16 there?

17 A I never searched for his name, no. I don't know.

18 Q On anything that you have there is there any mention
19 of Mr. Robert Fingerhut?

20 A No.

21 Q Is there any indication of Mr. Roberts?

22 A No, not on these documents.

23 Q Pardon?

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1 A Well, just Donna Roberts.

2 Q On any of that does it say -- when they normally
3 have deeds don't they usually issue Mr. and Mrs., you know,
4 as husband and wife?

5 A They give their marital status on a deed. Like here
6 it says Donna Roberts -- wait a minute. Somewhere here.

7 It's the party that's selling it, they give their marital
8 status, but not she when she purchased it, no, it didn't
9 here. On the mortgage -- no, that's another deed. It just
10 gives the marital status of those who are selling it so you
11 know who has to sign.

12 Q There is no indication on any of that paperwork that
13 Donna Robert was married to anybody?

14 A I believe -- I don't want to say without looking
15 first. Okay, here's a mortgage. It says Donna Roberts,
16 single, and that was July 13th, 2001.

17 Q I'm sorry, what was the date of that again?

18 A July 13th, 2001.

19 Q July 13th. So no indications on there, other than
20 Donna Roberts single, no mention of Fingerhut, Robert
21 Fingerhut, and no mention of a Mr. Roberts either?

22 A Not that I saw.

23 Q Thank you.

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1 THE COURT: Any other questions?

2 REDIRECT EXAMINATION OF MS. DIANA MARCHESE

3 By Mr. Watkins

4 Q Yeah, just one question, Donna -- Diana. The
5 mortgages on the property, the Fonderlac property, are still
6 outstanding, they haven't been satisfied, is that correct?

7 A Let me make sure. The one satisfaction went with --
8 yeah, there is one, and that one was, that was the \$31,200
9 one was satisfied.

10 Q The other two haven't been?

11 A Are still open according to our records, yes.

12 Q Okay. Thank you.

13 RECROSS EXAMINATION OF MS. DIANA MARCHESE

14 By Mr. Consoldane

15 Q Diana, but still you can't tell how much is actually
16 still owed on those two mortgages?

17 A No, I wouldn't know.

18 Q You only know that there was three mortgages at one
19 time, one is satisfied, there are two more, but there's no
20 way to tell how much is still owed on those two mortgages?

21 A Not from our records, no.

22 Q Thank you.

23 THE COURT: Mrs. Marchese, thank you very

1 much.

2 A Uh-huh.

3 THE COURT: The State have anything else
4 to present?

5 MR. WATKINS: No, Your Honor. We are
6 resting on rebuttal.

7 THE COURT: Resting on your rebuttal?

8 MR. WATKINS: Yes.

9 THE COURT: Okay.

10 MR. WATKINS: With admission of our
11 exhibits, we move for exhibits.

12 THE COURT: We'll take that up. Okay.
13 Ladies and gentlemen, you've heard all the evidence which
14 will be presented in this case. We are going to spend the
15 rest -- yes.

16 MR. CONSOLDANE: We need to put something
17 on at side bar. It will just be quick.

18 (Whereupon, the following proceedings were
19 held at side bar outside the hearing of the jury.)

20 MR. CONSOLDANE: Your Honor, before we
21 release the jury we would, we would request to bring a
22 witness in on surrebuttal. We would like to bring Paul
23 Monroe back on the stand and have him identify the complete

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1 ensemble that he found Mr. Fingerhut was wearing. He's
2 testified to the clothes, there's been mentioned again about
3 the jewelry, and I would like to have him show the jury just
4 what jewelry he was wearing.

5 MR. WATKINS: May I respond, Your Honor?
6 Your Honor, the purpose of the surrebuttal is to rebut what's
7 in issue. The jewelry is a collateral matter they brought in
8 and it's already in evidence, he had jewelry on, the
9 deceased. I think it's not in issue at this point. It's
10 already been covered.

11 MR. CONSOLDANE: Has the jewelry already
12 been marked as an exhibit?

13 MR. WATKINS: No, the jewelry hasn't, but
14 you covered that on examination, he had jewelry, he had money
15 on him when he was killed.

16 MR. LEWIS: We want the jewelry that's --
17 he wanted it marked as an exhibit.

18 MR. WATKINS: It's not relevant at this
19 stage. It should have been done before.

20 THE COURT: What is the relevancy of the
21 jewelry? There's testimony that he had --

22 MR. WATKINS: The issues here dealt with
23 the property, the real estate, and it dealt with the car.

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1 That's all. That's all we focussed on.

2 MR. CONSOLDANE: His own witness started
3 telling, you know, about the jewelry that he was wearing. I
4 think that we have -- I would ask leave to be able to call
5 Paul Monroe to the stand, have him introduce that and mark it
6 as an exhibit.

7 THE COURT: That was something brought up
8 on cross.

9 MR. LEWIS: Yeah, we brought it up.

10 MR. WATKINS: Yeah, it was brought out in
11 cross. It is not appropriate surrebuttal.

12 MR. LEWIS: No, I'm talking about cross
13 back in the case when you talked to him about the jewelry and
14 everything else and they indicated he had the jewelry,
15 whatever. We just wanted it marked as an exhibit. That's
16 what he identified, that's it, mark it as an exhibit.

17 MR. CONSOLDANE: That's all. As a matter
18 of fact, if they will stipulate to it we don't even need to
19 put him on.

20 MR. LEWIS: He listed the jewelry that he
21 found on the body, was recovered from the autopsy at the
22 morgue, and it's in there.

23 THE COURT: You want that in to show

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1 physically if it was robbery he would have taken the jewelry?

2 MR. CONSOLDANE: Yeah. And also kind of

3 goes on what he wears, you know, what he --

4 THE COURT: What does what he wears have
5 anything to do?

6 MR. WATKINS: There are photographs. All
7 this was covered except they didn't choose to put the
8 physical exhibits in.

9 THE COURT: Will you stipulate that the
10 jewelry is what he had on?

11 MR. CONSOLDANE: And then introduce it?

12 MR. WATKINS: I think whatever is listed
13 in the coroner's papers, which I think are part of this
14 record, yeah, they can argue that he had the jewelry on.

15 MR. CONSOLDANE: But would you mark the
16 actual jewelry as an exhibit?

17 MR. WATKINS: I think you've passed up on
18 that, Tony. I don't think we can.

19 MR. CONSOLDANE: So I'm ineffective
20 assistance of counsel and the guy loses the case because we
21 didn't bring it in at that time. Go ahead.

22 MR. WATKINS: I think it's already in.

23 THE COURT: Don't get on your high horse.

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1 I just don't see where it has any relevancy at all except for
2 the argument that could be made I guess that if I was going
3 to rob the guy I would have taken his jewelry. He was right
4 there, I didn't take it, therefore I'm not guilty of robbery.
5 Yes, it's either --

6 MR. WATKINS: I agree, judge, and that's
7 in the record. That's all I'm saying.

8 MR. LEWIS: That infers.

9 THE COURT: It has not been marked as an
10 exhibit as the jewelry that he had on his person, right?

11 MR. LEWIS: No.

12 THE COURT: Either let him do it, I will
13 either let them do it or you both agree to mark it, have it
14 admitted as an exhibit, that this was the jewelry he had on
15 his person. I can't make you do that, Mr. Prosecutor.

16 MR. WATKINS: Are you going to let them
17 reopen to do that? Okay, we'll stipulate, Your Honor.

18 THE COURT: You'll stipulate to that.
19 Okay. That will be marked then as a further exhibit, as a
20 joint exhibit.

21 MR. WATKINS: No. Joint exhibit is fine.

22 THE COURT: Joint exhibit. So you have
23 nothing else to call then?

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1 MR. CONSOLDANE: No.

2 (Whereupon, the side bar conference was

3 concluded.)

4 THE COURT: Okay. Both sides have now
5 rested their presentation of evidence and there will be no
6 further evidence that will be presented to this jury. I am
7 going to release you until 9:00 o'clock in the morning and
8 the rest of the day will be spent by myself reviewing with
9 both sides the final instruction of law which you will hear
10 tomorrow.

11 When you return in the morning -- we're a day late.

12 We had some things come up. I told you at the beginning this
13 happens. You will listen to the closing arguments in the
14 morning tomorrow. That would take up probably most of the
15 morning. I hope, however, to also have time to give you the
16 closing instructions, and by noon or shortly thereafter you
17 should have this case for deliberation.

18 As you know, once the case is delivered into your
19 hands then you are all sequestered until you've reached a
20 verdict. No one knows, you don't have any idea any better
21 than we do at this point, how long that's going to take you.
22 I'll explain to you once you start as to some of the other
23 things that you must know, but if you would be back here at

1 9:00 o'clock in the morning we will get started with the
2 balance of this trial. And again I would remind you not to
3 watch anything on TV, read anything in the newspaper, have
4 any conversation with anyone else, or allow anyone else to
5 approach and talk with you about the matter.

6 Anything else, gentlemen, that you wish me to inform
7 -- oh, by the way, I hope you all got to vote today. Did
8 you? You still have the rest of the day anyways. I won't
9 tell you how to vote, that's your choice, okay. I would like
10 to but I won't. Okay. You all have a nice evening here.

11 (Whereupon, the jury was excused for the
12 evening and the following proceedings occurred thereafter.)

13 THE COURT: Okay. Gentlemen, we have the
14 exhibits and I believe the defense has one more motion before
15 we're done.

16 MR. LEWIS: Yes, judge, as soon as my
17 compatriot gets back or whatever. All right.

18 MR. WATKINS: Do we have something else,
19 judge?

20 THE COURT: You want to put your exhibits
21 in?

22 MR. WATKINS: Yes.

23 (Whereupon, a brief recess was taken.)

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1 MR. LEWIS: The prosecution, I assume,
2 judge, is moving for the introduction of their exhibits that
3 was presented on rebuttal here.

4 THE COURT: May we proceed without Tony or
5 what do you want to do?

6 MR. LEWIS: Oh, sure, judge. I'm just
7 waiting for Dennis. If he doesn't say he wants to introduce
8 them I'm fine with that. You want to introduce them, Tony,
9 or Dennis?

10 THE COURT: Mr. Watkins, you want to
11 address those exhibits?

12 MR. WATKINS: Yes. We move to admit the
13 exhibits, which include 400 and -- I think it's 401, 400, 402
14 and then --

15 MR. MORROW: 398A through N, 399A through
16 J I believe.

17 MR. WATKINS: 398 through 402, we move
18 that all the exhibits be admitted.

19 THE COURT: There's a move to admit those
20 exhibits just designated on the record. Is there any
21 objection?

22 MR. LEWIS: Yes, judge, we would object to
23 all the exhibits except for the deeds. First off, we would

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1 object to the introduction of the maintenance records in
2 regard to both motor vehicles based upon our prior objections
3 to that. The State evidently is trying to show through the
4 maintenance or the introduction of those records that the
5 possession or -- well, possession, custody or control,
6 whatever he's trying to prove, which doesn't necessarily
7 prove. If somebody brings a car in and takes it back out it
8 doesn't mean they necessarily have control in between time,
9 after time, before time, it doesn't really prove that.
10 But, in any event, the argument would be this, is he
11 brought the cars in supposedly by these records. These
12 records don't prove that at all. They knew him as
13 Mr. Roberts, for God's sake, they didn't even know him as
14 Mr. Robert Fingerhut. So just on that basis alone, judge, we
15 would indicate that not only the exhibits in regard to the
16 maintenance of both vehicles but also the testimony of
17 Mr. Carmen Oliva and also the testimony of Mr. Barry Ricker,
18 I think his name is, be stricken from the record because it's
19 pretty obvious that Mr. Fingerhut just wanted everybody to
20 know that he was known as Mr. Roberts and he didn't want to
21 tell them his true name. And he signed as Mr. Roberts,
22 that's what the understanding was from Preston, so he signed
23 as Mr. Roberts, so we have Mr. Fingerhut using fictitious

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1 names again as usual, which is some of the evidence we wanted
2 to bring in. Now the State has even brought it in on their
3 own indicating the fact that Mr. Roberts for five years had
4 Mr. Carmen Oliva under the impression that he was Mr. Roberts
5 and he never told him he was Mr. Fingerhut, and that's nice
6 for a five-year relationship.

7 And the same with the actual maintenance records.
8 It is one thing to tell a salesman. It's another thing to go
9 in there and sign statements and billings and all that kind
10 of stuff under the impression that the person that's signing
11 is really Mr. Roberts, who, of course, he wasn't. And that's
12 the reason we object to those two entries.

13 We would object in regard to the entries and the
14 exhibits referring to the mortgages because those do not
15 represent the current values. That's obviously what the
16 prosecution is trying to do is introduce those mortgages and
17 say that the value of the property was this and if you
18 subtract the mortgages there's no value here, therefore
19 there's no money in the house.

20 However, as Diana Marchese indicated, there is no
21 way for her to tell without a satisfaction of the mortgage to
22 say how much the balances are so it becomes incompetent
23 evidence, judge, at that point. You can't tell from that,

1 you can't tell whether the mortgage -- three-fourths of that
2 could be paid off already. People go out and take mortgages
3 out on houses and if three-fourths of it's paid off you don't
4 know that until you contact the bank. The bank is the only
5 one that can tell you how much the balance of the mortgage
6 is, and for that reason I would say that the mortgages are
7 incompetent evidence as to what they were placed in evidence
8 for, and that's the reason to figure out the value of the
9 property after you subtract the mortgages. Therefore, it's
10 incompetent and should be excluded.

11 MR. WATKINS: May I respond, Your Honor?

12 MR. LEWIS: The only thing that we are
13 allowing is the deeds. We have no objection to the deeds.
14 They're in the name of Donna Roberts.

15 MR. WATKINS: Your Honor, this is proper
16 evidence in rebuttal. We believe that the relevant material
17 goes to weight, not admissibility. And I would further note
18 that all the documents that we have sought to have admitted,
19 including the mortgages, go in line with evidence that we are
20 going to argue, as defense counsel will argue it would be
21 proper surrebuttal, for example, as to how much mortgage
22 value it is now. They could bring in and show that they take
23 a 75,000 and they don't owe 75,000. But it's the State's

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1 position that we're permitted to show that there were
2 mortgages out on these properties, every single one had
3 mortgages, and there are still outstanding mortgages on the
4 property of Donna Roberts regarding the Fonderlac address.

5 THE COURT: Okay. The last argument
6 first. I think the term was used incompetent evidence as far
7 as the mortgage. I think that may not be the most correct
8 term. It's incomplete evidence to give the jury all the
9 picture that is necessary, but I don't know for what purpose
10 that was brought in other than, as Mr. Lewis fears, to show
11 that there was a large amount of money there for the killing
12 to get the insurance.

13 But, in any event, I suspect that every juror knows
14 that the face amount of a mortgage is not necessarily the
15 present value of that mortgage and that's subject to
16 argument. It's not improper evidence. As I say, it may be
17 incomplete evidence, but that's not the test.

18 As far as the objection to the records, a part, a
19 big part of the argument that's gone on in this case is all
20 the evidence that's been submitted to show the State's view
21 of legal title not being necessary to have several of these
22 statutes apply as opposed to the defense's argument that
23 legal title is, in effect, everything and that the State --

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1 or, I'm sorry, the defense disagrees with the State's
2 contention that a possessor of property as well as a legal
3 titled holder of property can be robbed or burglarized.
4 That's the essence of this whole argument that's gone on
5 through the trial and the Court has ruled that the statute
6 quite clearly defines owner as a legal title holder, a legal
7 possessor of property, and in some cases, a person who holds
8 a particular piece of property without any good title,
9 equitable or legal. A robber can be robbed of things.
10 Therefore, consistent I think with prior rulings, I will
11 overrule the objection as raised.

12 MR. MORROW: Your Honor, I just want to
13 clarify the record. It's actually 398A through P, 399A
14 through K, 400A through D, 401A through C, and 402A through F
15 are the exhibits that the State had presented.

16 THE COURT: Yeah, those were not really
17 clarified on the record. They were read three or four times.
18 Thank you for that. Those are admitted.

19 Now, the jury is gone. I would propose that we meet
20 here at 1:00 o'clock, and do both sides have your proposed --

21 MR. WATKINS: We will be prepared at 1:00
22 o'clock with ours.

23 MR. LEWIS: They have it proposed. I just

1 have to bring OJI, I mean, you know. We're archaic over
2 there. I've got a monk and he's so tired over there, he's
3 writing.

4 THE COURT: Well, there's one point that
5 we talked about at some time on side bar -- I've lost --
6 maybe it will come back -- that the defense may have wanted a
7 specific explanation on something. Do you recall what that
8 was? We'll come upon it when we go through it. I'll see you
9 all at 1:00.

10 MR. WATKINS: Thank you, Your Honor.

11 THE COURT: Thank you, folks.

12 MR. LEWIS: Oh, judge, we should for the
13 record, our Rule 29, move for that again.

14 THE COURT: Oh, yeah. Rule 29, your
15 motion is proffered.

16 MR. LEWIS: Yeah, since there was --

17 THE COURT: And for the same reasons as
18 previously given, the Rule 29 motion is denied.

19 (Whereupon, a recess was taken.)

20 * * *

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1 Tuesday, November 5, 2002:

2 (In-chambers with all counsel present at 2:45 p.m.)

3 THE COURT: We're in-chambers out of
4 the hearing of the Jury. We have been going over
5 the charge of the Court.

6 MR. LEWIS: Waive the presence of
7 the Defendant.

8 THE COURT: I think we have narrowed
9 it down to an instruction that is agreeable. That
10 doesn't mean that the Defense agrees with the
11 content of some of the instructions, but they are
12 in agreement that the Court will give them in a
13 manner in which we'll presently put on the record.

14 MR. LEWIS: That is a fair
15 statement. To cut this short, I'll just indicate
16 to the Court, I'll indicate in the instructions
17 here that things we disagree with, I know the Court
18 is going to probably allow and the rest of the
19 items we have agreed to, and the Prosecution will
20 type it up the way we talked about it.

21 THE COURT: I suggest this. We'll
22 have these, a printed copy to give to the Jury,

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1 specifically, I think you should put on the record
2 those portions that I have said I would give that
3 your --

4 MR. LEWIS: That is what I'm going
5 to do. The first item would be item -- it is on
6 page four of the proposed instructions. I got the
7 wrong one.

8 MR. CONSOLDANE: Actually we're
9 going to start with on page two, direct and
10 circumstantial evidence are of equal weight or
11 probative value. I think that it is more
12 correctly, "May be of equal weight and probative
13 value."

14 MR. WATKINS: Whatever the OJI is.

15 MR. MORROW: Apparently in State vs.
16 Jenks, 1991, 61 Ohio State 3rd, 259, the Supreme
17 Court opined that the law requires that
18 circumstantial and direct evidence be given the
19 same value. Therefore I think the language in "R"
20 is correct.

21 THE COURT: Your objection is noted.
22 I'll go with the language "R".

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1 MR. CONSOLDANE: Then the second
2 objection is on page four with regard to the
3 flight. There's no evidence introduced in there
4 that he was purposely trying to elude anybody. He
5 was simply spending some time in a motel room with
6 Donna Roberts. I don't think that instruction
7 belongs there. They were the ones that were going
8 to talk about him having sex and alcohol and
9 cigars.

10 THE COURT: We have had discussion
11 on this, and the State has raised the citation of
12 two cases.

13 MR. MORROW: That would be State vs.
14 Owens, which is 1996. West law 648760, 11th
15 District Court of Appeals case. Number 95-L-078.
16 That is where we took the exact language from the
17 decision rendered by the 11th District Court of
18 Appeals. Also we have reference to State vs.
19 Taylor, 1997. Cited at '78 Ohio State 3rd (15).
20 Where the Supreme Court has held that a Defendant's
21 flight from justice may be indicative of
22 consciousness of guilt. I think in this case, we

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1 have a Defendant, as maintained is in an accidental
2 death of an individual, yet he goes and hides
3 himself at a hotel and then hides himself at
4 another location and flees from the residence and
5 takes the car and abandons the car on the street in
6 Youngstown.

7 MR. CONSOLDANE: I think that is
8 unnecessary and the prejudice of that type of an
9 instruction outweighs any value that it would have
10 in the ordinary instructions. They have never
11 brought into the fact that he was evading anybody
12 when he left the house. He certainly left the
13 house and wanted to get out of there and abandoned
14 the car, but that was all at the instructions of
15 Donna Roberts and then he went and spent the time
16 with her in the motel.

17 THE COURT: I think from the
18 evidence presented there is -- there's several
19 different things that the State presented, which
20 shows that if the Jury accepts the fact he was
21 there, he did the murder, that he took the car and
22 then in affect hid out during a period of time. I

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1 can visualize that that question may well be posed
2 back in the Jury room. Well, look folks, he ran
3 and tried to hide after this. What does that mean
4 or can we use that? This instruction says, yes,
5 you can use that if you make that finding, and I
6 think that is helpful to the Jury.

7 MR. LEWIS: I want to add in regard
8 to a flight instruction, the problem with that is
9 that there's no definitive limits as to what
10 constitutes flight. How far do you have to be from
11 the scene? How long do you have to be away from
12 that and what the criteria is? It is a totally
13 nebulous thing. If somebody walks away from the --
14 or walks a half a block and wants to report it to
15 somebody else, have they fled the scene? Who
16 knows? In this particular case, the indication
17 would be the fact is that what the State has
18 produced is evidence of the fact that he went to
19 the Days Inn and without any prompting or coaxing
20 on behalf of law enforcement authorities, he
21 actually returned to a Wirt Street address where he
22 was known to reside, and that is exactly where they

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1 found him. They had Donna Roberts call him on the
2 phone. It is not where he kind of gravitates back
3 to a place where they know they can find him is
4 basically what it boils down to.

5 THE COURT: I would merely say in
6 response to that that the question of flight is not
7 defined. I think that would be part of the
8 definition, but I would suggest that it would
9 become a question of reasonableness. You have
10 here, a duration of distance and time that I think
11 that the Jury could, you know, conclude that this
12 was indeed a flight. If your example, they went a
13 half a block to try and find somebody, that would
14 not be reasonable to say that was a flight, but
15 here it is over a matter of days. If he had any
16 intention of notifying the police of this incident,
17 I'm sure it would have been done in a rather quick
18 manner.

19 MR. CONSOLDANE: Your Honor, he
20 didn't fall into the category of flight. He left
21 the Fonderlac address, that is true, but from
22 there, he went and spent time, either one of two

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1 places, either in the motel with Donna Roberts or
2 back home. Flight would indicate that he left the
3 State of Ohio, left the area, at least left the
4 region and went down to Columbus or somewhere, but
5 he stayed in this entire area the whole time. That
6 is not under the definition of flight.

7 MR. WATKINS: Your Honor, if I may
8 respond, first off, the flight here is involving
9 going from Warren to Youngstown into Boardman,
10 which is a distance of 15 to 20 miles. We're
11 dealing with days. He was apprehended according to
12 record by a violent crimes task force, where they
13 had horns to announce to come out with your hands
14 up. The residence, there's nothing in the record
15 that he lived at the Wirt Street address living --
16 has been in prison in the past year, so there's
17 nothing in the record to suggest that he lived
18 there. The most important thing, however, and to
19 repeat, this case, that Chuck Morrow cited from the
20 11th Appellate District, to-wit the Owens case, the
21 instructions in that case was given. "When the
22 appellant was leaving the scene, exited the

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1 Interstate, panicked, drove home and did not inform
2 anyone of the incident." They said that flight was
3 justified. With the person in this case we have an
4 Interstate, and didn't go home. He went to a motel
5 room and had Donna check him in. He didn't check
6 in himself and he abandoned the car somewhere in
7 Youngstown by nobody. If that isn't flight --

8 THE COURT: I think it is. That
9 remains in. The Defendant's objection is noted.

10 MR. LEWIS: Page six. Trespass.

11 MR. CONSOLDANE: There's one before
12 that. I believe that the order that the
13 instructions follow is improper. I think the
14 instructions should start with the Count 1 in the
15 indictment, and move to Count two, three, and four.
16 That is the only logical way that it makes sense.
17 I know they have done it in other cases. Other
18 cases that didn't make a difference. In this case,
19 it will make a difference, and just because they
20 have done something in another case where I didn't
21 object to it, doesn't mean that it is proper to do
22 it in this case, and I believe that the

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1 instructions should follow the indictment.

2 MR. WATKINS: Your Honor, the State
3 would note that it is within the discretion to put
4 a charge together in whatever fashion. It makes
5 sense to include the felonies first, because of
6 definitions that are involved with the aggravated
7 murder charge. This has been done in cases that go
8 back at least five years, and including this
9 Court's very last capital case. There's been no
10 law cited that it is improper, and I think with
11 what has been worked out by way of having
12 definitions of the aggravated burglary charge, that
13 there's not going to be a definition problem.

14 THE COURT: I do not believe that
15 bad habits should ever become custom, but I have
16 asked for, from both sides, authority to do it, and
17 authority where it should not be done. I have
18 heard none and I assume there's none. I think this
19 is something that is within the realm of discretion
20 of the Court. And I have done it in the past, and
21 I cannot for the life of me see how it would be
22 prejudicial to the Defendant. I think that has to

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1 be the bottom line. I think it does make it more
2 understandable. But in any event, this Jury is
3 going to have a copy of this. They can read it
4 over to their heart's content, and the manner which
5 it is given, I don't think is important. The
6 important part is that they understand the
7 inter-relationship between these terms and I think
8 this will provide as much as I possibly think would
9 be necessary.

10 MR. CONSOLDANE: You are going to
11 give a copy of this to the Jury?

12 THE COURT: That is my intent.

13 MR. CONSOLDANE: I would object to
14 that.

15 MR. WATKINS: We favor that.

16 THE COURT: There's case law on
17 that?

18 MR. WATKINS: Absolutely.

19 THE COURT: It is highly favored by
20 the Appellate Courts. We can not usually do it,
21 but with the technology that is available now, it
22 has become possible to do it. Whenever possible in

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1 doing it, I think it is most helpful in civil cases
2 as well as criminal. Your objection is noted.

3 Next one.

4 MR. LEWIS: Page six. Under the
5 section, trespass. The OJI definition for trespass
6 means knowingly entering the land or premises of
7 another, without privilege to do so. It also,
8 basically what it refers you to is the trespass
9 statute. The Prosecutor has proposed other
10 language here, and the other language is as
11 follows. "Any entrance or remaining in knowingly
12 made in the structure of another that is unlawful
13 if it is without the authority, consent or
14 privilege to do so." I don't know if that is -- I
15 take it back it, that is almost part of the
16 definition of trespass. The next two paragraphs,
17 however, are not. "Where a Defendant lawfully
18 entered a residential premises, the privilege to be
19 in or upon this premises can be inferred to have
20 been revoked where the Defendant thereafter commits
21 a violent felony directed against another person in
22 the premises who had the ability and authority to

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1 -revoke the privilege." That paragraph in and of
2 itself, that has been extracted from evidently case
3 law, however, it is not committed to nor is it
4 contained within OJI. OJI simply gives you the
5 idea of what deception is. Gives you definition,
6 gives you the definition of trespass. Gives you
7 the definition of privilege, and it is up to the
8 Jury to interpret the evidence, to fall within
9 those categories and they are perfectly capable of
10 doing that. The next paragraph "Where one enters
11 upon the property of another as an invitee or
12 licensee, that person loses his status as an
13 invitee or licensee and becomes a trespasser when
14 it becomes evident that the purpose of such entry
15 is to commit a criminal offense against the owner."
16 Likewise --

17 MR. WATKINS: "The owner" was taken
18 out.

19 MR. LEWIS: It didn't work out to
20 their advantage on that one.

21 MR. WATKINS: That is not the law.

22 MR. LEWIS: The problem here is that

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1 if they take and craft specific instructions that
2 come from factual cases and construct it so that
3 you are telling the Jury, basically, as this, this,
4 this and this comes in, and define this. We're
5 going way outside the realm of instructions. The
6 instructions are already given. When it says
7 trespass, whether it says burglary, when it gives
8 the definitions of deception, trespass, privilege,
9 occupied structure, it is all up to the Jury to
10 interpret and define and apply that to the facts of
11 the case. What they are doing is, and when you put
12 that in the instructions here, you are almost
13 leading the Jury to believe and assume, that the
14 Court believes, that this is what has been proved
15 in this case, and in other words, "The Defendant
16 revoked when he submitted an offense." If they
17 don't find he committed an offense, you are
18 revoked. You are indicating to them and hinting
19 towards the idea is that, yes, an offense was
20 committed and there's no privilege to be there. It
21 is the same thing as saying, going back to say for
22 instance the aggravated burglary statute and

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1 saying, going to be a special instruction. If you
2 find that he was in there after dark, you can
3 presume that he could have been without authority.
4 You can take that in any case. You can take any
5 set of facts and craft some instruction. What you
6 are doing is, you are invading the province of the
7 Jury to determine, that is why it has the standard
8 definitions for stealth, deception, trespass.
9 We're not crafting instructions based on special
10 cases to infer or to lead the Jury to the idea that
11 this happened. They can come to that conclusion
12 without that. What it does is it almost convinces
13 them and psychologically tells them, that okay,
14 well this is exactly what we're talking about here.
15 This fits right in, and this is -- no, it doesn't.
16 It all can be determined from that, because let's
17 put it this way. OJI doesn't have that in there
18 and if they believe that Juries are smart enough to
19 come to the right conclusion based on OJI, why does
20 the Prosecution get a chance to plug in
21 instructions, supposed instructions, that gives
22 them their right. It doesn't make any sense to me.

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1 THE COURT: Before I listen to
2 argument, I find an anomaly here between OJI and
3 the code. There's two sections that deal, there's
4 criminal trespass and aggravated trespass.
5 Criminal trespass reads "No person, without
6 privilege to do so, shall do any of the following.
7 Knowingly enter or remain on the land or premises
8 of another. Knowingly enter or remain on the land
9 or premises of another, the use of which is
10 lawfully restricted. Recklessly enter or remain on
11 the land or premises of another. Being on the land
12 or premises of another, negligently fail or refuse
13 to leave upon being notified to do so by the owner
14 or occupant or the agent or servant of either."
15 There's some other stuff about defenses which
16 wouldn't apply. "Whoever violates this section is
17 guilty of criminal trespass, misdemeanor of the
18 fourth degree."
19 Aggravated. "No person shall enter or
20 remain on the land or premises of another with
21 purpose to commit on that land or those premises a
22 misdemeanor." This burglary charge starts with,

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1 "No person shall trespass."

2 MR. WATKINS: We're citing an
3 interpretation of the aggravated burglary statute
4 dealing with that issue in State vs. Steffen.
5 We're using interpretive law from the Ohio Supreme
6 Court for this instruction.

7 MR. MORROW: I'll note when you have
8 a situation involving Jury instructions, and
9 there's a confusion or misleading issue, the Court
10 is at liberty to expound upon Ohio Jury
11 Instructions, so a Jury is properly and adequately
12 educated as to the status of the law and the Court
13 is clear, based upon the arguments that preside,
14 these instructions with respect to the Defense's
15 motion for acquittal, and the discussions that have
16 been had over the last three or four days as to
17 what constitutes a trespass and whether or not the
18 Defendant's actions constitute a trespass. And
19 since it is an issue that is confusing in this
20 case, because you have questions about permission,
21 non-permission, authority, possession, all of those
22 things, then the Court is in a position to further

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1 expound upon the definitions. And when we talk
2 about State versus Steffen, there's the discussion
3 in Steffen, which is cited as 31 Ohio State 3rd,
4 111, which is a 1987 case, where they talk about
5 that a person "becomes a trespasser subject to
6 conviction for burglary by virtue of the commission
7 of the felony on the premises." In this case, it
8 allows the discussion in that case, allowed the
9 Jury to infer that the Defendant's rightful acts of
10 being on the property, could be terminated by his
11 subsequent actions.

12 THE COURT: Let me stop you right
13 here. What you are saying then is that trespass in
14 that case is used as a generic term and not in
15 reference to the criminal or aggravated trespass as
16 defined in the statute?

17 MR. MORROW: Correct.

18 THE COURT: It is the only way it
19 makes sense.

20 MR. MORROW: We're talking about a
21 generic trespass and trespass can be either of a
22 criminal trespass or aggravated trespass. It is

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1 the appropriate definition, given the facts and
2 circumstances of each particular case as to what
3 constitutes quote unquote trespass, and in this
4 case you have the Steffen case, which refers to
5 that trespass. You also have State vs. Lilly,
6 which is 87 Ohio State 3rd (97), 1999 case where
7 they talk about that a person committed a trespass
8 against the property of which one is the legal
9 owner if another has custody or control over that
10 property. And furthermore, then in State vs.
11 O'Neil, which we also list which was 87 Ohio State
12 3rd, 402, it talks about that these crimes can be
13 committed when people are lawfully in those
14 premises. Finally, with respect to the second full
15 paragraph, that is University, Cincinnati or City
16 of University Heights vs. Conley, which is 252
17 Northeast 2nd, 197, and again, that language was
18 taken directly from that case where it says where
19 one enters upon the property of another as an
20 invitee or licensee, that person loses his status
21 as an invitee or licensee and becomes a trespasser,
22 when it becomes evident that the purpose of such

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1 entry is to commit a criminal offense. And that is
2 the language that is taken directly from that. And
3 again, in this kind of situation, it is up to the
4 Court to provide further enlightenment to the
5 jurors to understand what the true status of the
6 law is and in this case, the status of the law, is
7 that a person, not the owner, who is in possession
8 of the property, or who has custody and control
9 over the property, can grant someone permission to
10 be there, can revoke that person's permission to be
11 there. And similarly, in the event that someone
12 institutes a criminal act against the person that
13 is in custody or control of that property, they
14 then, the Jury is in a position to infer, that that
15 person has now committed a trespass, and quite
16 simply, that would be the situation where you have
17 an invitee, a traveling door to door salesman,
18 comes into the property is invited in. While in
19 that property, gets into a heated discussion with
20 the property owner over the merits of the quality
21 of the vacuum cleaner, pulls it out and commits an
22 offense against the property owner or the person

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1 that is in custody or control of that property.
2 They were an invitee, but at the point in time that
3 they now commit that criminal act against them, the
4 Jury is proper to infer that they had been, that
5 their permission to be on that property had been
6 revoked and in essence, they become a trespasser.

7 MR. WATKINS: And you can have joint
8 occupy which we have in this case.

9 MR. CONSOLDANE: I have never had a
10 case where they have had so much, want the Jury to
11 infer so much about a case that hasn't been proven.
12 For them to just extrapolate certain parts of
13 sentences out of cases to fit into a Jury
14 instruction, I think is clearly wrong. OJI looks
15 at all of these possible things, puts it in there
16 and puts it in such a way that both sides get a
17 fair shake at it. This has been strictly put in
18 there just to benefit them. Not to help the Jury,
19 but to help the Jury convict the Defendant is the
20 only thing that they are trying to do. It is not
21 according to OJI and doesn't belong there.
22 Especially, they even took out from the first set

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1 that they gave me, they even cut off the last part
2 of the sentence because it didn't suit them. It is
3 not fair.

4 THE COURT: I have no question in my
5 mind that the Prosecutor does not put anything in
6 here with any other alternative but to get a
7 conviction in this case.

8 MR. CONSOLDANE: That is why I
9 object to them doing this instruction. We think
10 that this is strictly something the Court should do
11 and the Prosecutor shouldn't have this much input.

12 THE COURT: I go through this every
13 time with you. The Court is overseeing the
14 preparation of this. And as far as this
15 description to the Jury of what trespass is. It is
16 by anyone's definition tailored to the facts of
17 this case to agree, but that tailoring is based on
18 prior case law, and on a reading of 2911.21. And
19 therein contains all of the arguments that we have
20 been talking about. The answer to them, I think,
21 as to the answer on the question the Court
22 previously ruled on, it is quite clear from reading

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1 2911.21 that owner or occupant or agent or a
2 variant of either, can make a person a trespasser
3 by telling them to leave. We have gone through
4 this argument about the title or the right of
5 possession. I think inherent in that portion of
6 the statute is the answer to what we have been
7 arguing about. The law is based on common sense
8 and a person can become a trespasser through the
9 means by which the language has been drafted in
10 this case, and I would be very surprised, if any
11 Courts of Appeal would take umbrage with that
12 wording. I think it is fair wording, because I
13 think it is the way that the law is or will be once
14 the Court of Appeals reviews it. It just doesn't
15 make any sense to do it otherwise. To accept the
16 arguments here that he was not a trespasser because
17 the wife gave him permission to be there, to kill
18 her husband, or that he was invited into the house
19 and anything that flowed there from was not a
20 trespass, just doesn't make common sense to me. I
21 don't think that the law intends that. I think by
22 any reading of the law, that this is a good and

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1 sufficient explanation of what the law of trespass
2 is. A portion of the law of trespass. What else?

3 MR. CONSOLDANE: Only that I think
4 trespass -- trespass is trespass. Murder is
5 murder. I don't even know, trespass is not an
6 element of murder, it is only an element of either
7 the burglary or the robbery and that is so far
8 removed from the fact that nothing was ever even
9 taken. I think the whole thing is insane.

10 THE COURT: Took the automobile.

11 MR. WATKINS: The keys and the
12 automobile. It is uncontradicted.

13 THE COURT: You care to give me a
14 definition of what you think the limitations of
15 trespass here are?

16 MR. LEWIS: In the first instance
17 when it refers to that, OJI, this is the 202
18 version, all of the cases they have referred to
19 have already occurred. They are already indicated
20 in here. And they do it supplementally and they
21 don't do it necessarily in the language of what the
22 Prosecutors have proposed, but the point is -- the

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1 point is, that is the amazing part. If OJI, and
2 these are the scholars that put this together and
3 it is kind of amazing to me that they wouldn't go
4 ahead and say, if this is your fact pattern, then
5 go ahead and give this instruction. And they
6 really don't do that. And if that is the case,
7 then they would put in there and craft certain
8 things, but they continue to put in here, when you
9 have trespass or when you have the trespass, it
10 says refer to and you go to the trespass statute.
11 You have to put the elements of the trespass
12 statute in there and that is what it really says to
13 do. Then it elaborates down below. But some of
14 the things the Court just referred to, as going in
15 with the husband or to kill the husband or
16 whatever, that is not the case here. We don't have
17 a husband. We don't have that.

18 THE COURT: I should say significant
19 other. You're right.

20 MR. CONSOLDANE: That is something
21 they should argue. It is not something you should
22 tell the Jury.

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1 THE COURT: I don't plan on telling
2 the Jury that. It was a miss slip on my part to
3 use the term "husband". Mr. Watkins has been doing
4 it.

5 MR. LEWIS: That is one of the
6 problems, also.

7 MR. WATKINS: We'll get to some of
8 this, what we can argue and not argue.

9 THE COURT: First off, OJI is a
10 guide. Whenever in doubt, go with the OJI and you
11 can't do much wrong. But OJI is merely a proposal
12 of something that is safe for purposes of appeal.
13 This has all been tested through case law. If you
14 notice on the instructions of aggravated trespass,
15 it says, "The Defendant is charged with aggravated
16 trespass. Before you can find the Defendant guilty
17 of this offense, you must find beyond a reasonable
18 doubt that on or about the blank day of blank in
19 the count, the Defendant entered on the premises,
20 it says a certain name of the owner or occupants,
21 with purpose to commit on that land or premises,
22 the offense of, and then it says, insert

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1 description of either an offense, the elements of
2 either an offense, the elements of which involved
3 caused physical harm, or to cause a person to
4 believe they were about -- in the face of imminent
5 physical harm." You notice they don't limit that
6 to a misdemeanor. The statute does. What if you
7 have somebody going on the property to commit a
8 trespass. If I follow OJI and refer to that
9 section of law, 2911.21, I can't ever follow OJI
10 and get a description of trespass that makes any
11 sense in this case. Therefore, there's no
12 trespass, that is what you are arguing.

13 MR. LEWIS: We can argue that and
14 they can argue that there was a trespass. I don't
15 believe that the Court should be in a position to
16 tell the Jury that there's a trespass.

17 THE COURT: The definition of the
18 Jury that fits this particular case and I think
19 we're doing that by giving the wording that we have
20 in there. Your objection is noted for the record.
21 What else?

22 (OFF THE RECORD)

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1 MR. CONSOLDANE: A lot of this stuff
2 that we have been talking about hasn't been on the
3 record and a lot of this stuff --

4 THE COURT: What specifically? You
5 agree there's nothing of substance left off other
6 than our battering back and forth?

7 MR. CONSOLDANE: That is correct.

8 MR. MORROW: Mr. Lewis asked me
9 about serious physical harm and OJI lists through
10 five. I added six. "Death. Serious physical harm
11 to persons," because what more serious physical
12 harm to a person can you have than death?

13 THE COURT: Pretty hard to think of
14 one.

15 MR. LEWIS: They put the definitions
16 in.

17 MR. WATKINS: You want it out?

18 MR. LEWIS: Yes.

19 MR. WATKINS: We'll take it out. It
20 is not material.

21 MR. CONSOLDANE: Page 10. Owner.
22 We disagree with that definition.

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1 MR. MORROW: Your Honor, that is
2 right out of 2913.01 (D).

3 THE COURT: That is reading from the
4 statute there. You still object?

5 MR. CONSOLDANE: It is not out of
6 OJI. Let me just say this, that this definition of
7 owner is unconstitutional as far as I am concerned.
8 They have indicated that the -- that a license to
9 possession is unlawful. The fact is if they are
10 saying that if I take something from you, then
11 nobody can take it from me, that I'm a lawful
12 owner. Well, if I am a lawful owner, then you
13 can't charge me with theft of the thing. They have
14 gone completely overboard with this stuff. If they
15 are going to say that somebody is illegally in
16 possession of something, and they are protected by
17 law, that nobody can take it away from them and
18 doesn't say who they are talking about. If they --
19 you are in possession of it. It is way beyond this
20 interest is unlawful. It is ludicrous, that is
21 absolutely ludicrous. You can steal anything, and
22 I can keep ahold of it, I have committed a felony,

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1 and --

2 THE COURT: You would be charged.

3 MR. LEWIS: He's going to be guilty
4 of the crime, he takes it away from me. It is
5 ludicrous. That is an absolute ludicrous premise.
6 It is unconstitutional.

7 THE COURT: You mean a thief can't
8 steal from a thief?

9 MR. LEWIS: The implications are
10 greater than that.

11 MR. WATKINS: I think Mr. Lewis,
12 that this is probably one of the more clear areas
13 that the legislative service commission cites this,
14 make it very clear that in fact in Ohio, and I
15 think virtually in every state, a thief can steal
16 from a thief. If I would take your book, and I
17 didn't have your authority, and I walk out in the
18 street and somebody would shoot me and take the
19 book, they would be committing aggravated robbery.
20 If I would have a leased vehicle and I am beyond
21 the lease of Hertz Company and it is illegal for me
22 to possess the vehicle which a lot of citizens do,

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1 they are protected by the law that a person with a
2 gun can't steal that car, and say, "Oh, that person
3 did not have legal title," and therefore, there's
4 no robbery. That is the law, as clear as day.

5 MR. LEWIS: I'll tell you what. If
6 we're going to craft some instruction, if that is
7 what Mr. Watkins says.

8 MR. WATKINS: It is the law.

9 MR. LEWIS: Okay. We have some
10 facts indicated in this case that Mr. Fingerhut
11 regardless of whether the Defendant was in the
12 house, how he brought the Defendant with him. He
13 got out of his motor vehicle, he left that motor
14 vehicle. He left touching that motor vehicle. At
15 that point in time, he was not in possession of
16 that vehicle. He went into a house, and if he left
17 that vehicle, then anybody can hold or have custody
18 of that. Even if Mr. Jackson is a criminal, he can
19 go out and go into possession of that. He's
20 allowed to have possession it says to be lawful.
21 It is lawful if he's in possession of it.
22 Mr. Fingerhut abandoned that vehicle. It was in

3364

1 the garage. It was no longer in his possession.
2 Mr. Jackson, according to what that says, he
3 becomes the owner, he's in possession. As long as
4 he's in possession doesn't matter how it got there.
5 It is his. We would like an instruction to the
6 Jury that Mr. Fingerhut left the vehicle, was no
7 longer in possession of that vehicle and Nathaniel
8 Jackson, even if he stole it, he's a lawful
9 possessor of it. That is exactly what that kind of
10 definition leads to.

11 MR. MORROW: There's no proof that
12 he abandoned the vehicle.

13 MR. WATKINS: The fact that his keys
14 were taken and you got blood on the floor shows it
15 is his vehicle.

16 MR. LEWIS: He left it. He wasn't
17 the owner.

18 MR. WATKINS: That is not the law.

19 THE COURT: The point is, that in
20 your fact situation, he has stolen the car, as far
21 as the true owner is concerned. He's stolen the
22 car as far as the constructive licensee, or

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1 licensee if the car is concerned, if Mr. Jackson
2 steals the car and takes it down on Wick Avenue or
3 wherever and somebody puts a gun in his hand and
4 steals the car, they are guilty of theft, of
5 robbery. He didn't legally have the car. He
6 illegally had the car.

7 by fact MR. LEWIS: He stole from the legal
8 owner. I would say that.

9 THE COURT: He steals from the legal
10 owner and somebody steals.

11 MR. LEWIS: Are you talking about
12 legal, legal owner?

13 THE COURT: Jackson could be charged
14 with the illegality of stealing the car from the
15 licensee, but another person could be charged with
16 forcibly taking the car from Jackson, even though
17 he has no legal right to the car. Society couldn't
18 operate otherwise.

19 MR. CONSOLDANE: If you carry that
20 one step farther, if the titled owner of the car
21 gave permission for somebody else to use the car,
22 if somebody had stolen Mr. Fingerhut's car and she

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1 gave Nathaniel Jackson permission to go and
2 retrieve it, then he's not unlawfully in possession
3 of the car.

4 THE COURT: You're right, but that
5 isn't the case here.

6 MR. MORROW: That would be a defense
7 which would be provable by fact.

8 MR. LEWIS: All I would indicate is
9 that is that there's, everybody keeps saying that
10 is not the fact, but I'll indicate for the purposes
11 of record. In the letters it indicates that
12 Nathaniel is able to drive the cars by Donna
13 Roberts, who is the lease holder of that and also
14 there's an indication in the letters in October or
15 November of 2001 that he was also, he's been in the
16 house and whatever, and there's tacit permission to
17 go into the house by who is really the title
18 holder, deed holder to the property. Those are in
19 there. I would just say that. Whether you believe
20 it or not --

21 THE COURT: The Jury could find
22 that.

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1 MR. CONSOLDANE: I think the Court
2 ought to instruct the Jury that if the, if the
3 title owner gives a person permission to enter upon
4 the property, then he's not a trespasser.

5 MR. WATKINS: You can't give
6 permission to give somebody to take a vehicle.

7 MR. CONSOLDANE: I said if he gave
8 him permission to be on the property.

9 MR. WATKINS: Your client has given
10 a version contrary to what you are making up.

11 MR. CONSOLDANE: That is up to the
12 Jury to decide. The Judge should give the
13 instruction that if there was given permission to
14 be on property, it is not a trespass.

15 MR. WATKINS: Your client indicated
16 he took the man's keys. He didn't talk about
17 possession. That he was given permission.

18 MR. CONSOLDANE: She said he had a
19 right to drive the cars any time he wanted and he
20 had been in the house before.

21 MR. WATKINS: The record shows that
22 on the day right when this happened, she said that

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1 his car was stolen, and they put an APB, all points
2 bulletin for the vehicle. Because that is what the
3 woman said.

4 MR. CONSOLDANE: She didn't know who
5 took it.

6 MR. MORROW: Your client calls on
7 the cell phone in the car and says, "Come get me"
8 from your husband's car. He admits to calling her
9 on the cell phone.

10 MR. WATKINS: The whole state of the
11 evidence is this man did not know what is coming,
12 that's the only reasonable interpretation.

13 THE COURT: All I can suggest is you
14 draw the thing and have it tomorrow, we'll spend a
15 couple of minutes over whether there's any
16 instruction of that nature. You can at least put
17 it in the record as something you offered that the
18 Court refused, if I refuse it.

19 MR. CONSOLDANE: I am requesting
20 that you make an instruction that you tell the Jury
21 that if he has been given permission by the, either
22 the license holder of the vehicle to drive it, or

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1 the owner of the deed to the property, that then it
2 is no longer trespass, and it is up to them.

3 MR. WATKINS: He's got to revoke it
4 from the other person's possession.

5 MR. CONSOLDANE: You can give the
6 instruction, it is up to the Jury to determine
7 whether or not that permission has been terminated.

8 MR. MORROW: There has to be some
9 evidence in the case --

10 THE COURT: And you have to have an
11 instruction to follow as to that point.

12 MR. CONSOLDANE: You are already
13 giving that. I think you ought to give this before
14 that.

15 THE COURT: If you go to that point,
16 then I have to go into the whole deal of saying
17 even though initial permission may have been
18 granted by the legal title holder, that the actions
19 of the Defendant in regard to the person in the
20 house, and the person who had the license to drive
21 the car by and attacked upon him would revoke any
22 such permission given. Again, I don't know how you

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1 can have an indication that would operate under the
2 principles you are putting forward.

3 MR. CONSOLDANE: You maybe argue
4 that the permission to enter upon the house was
5 terminated if he decided that he went there with
6 the purpose to kill, but that has nothing to do
7 with terminating the permission to use the
8 automobile. If she gave him permission to use the
9 automobile, he didn't use that in the commission of
10 any offense.

11 THE COURT: Where is the evidence
12 before the Jury to substantiate that?

13 MR. CONSOLDANE: It is in the
14 letters.

15 MR. WATKINS: This goes back, he's
16 going to get cars after he kills. The Cadillac and
17 Lincoln.

18 MR. CONSOLDANE: She said, "You can
19 drive any of my cars."

20 MR. WATKINS: It is after he's dead.

21 MR. LEWIS: It was before. If you
22 say it is not in there, we say it is in there.

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1 THE COURT: I am giving you the
2 opportunity to draft up something for me to
3 consider whether it is going to be appropriate to
4 give or not. I think it is three steps beyond the
5 bounds of what is proper here. At least you can
6 put something in the record.

7 MR. LEWIS: On the old set, page 12.
8 Purpose. Purpose has been previously defined for
9 you. And it says in addition -- well, it is just
10 the way -- it is an instruction from OJI. Okay.

11 MR. CONSOLDANE: That is a very
12 rough reading paragraph.

13 MR. LEWIS: It is out of OJI.
14 Normally what they do is they simply put a heading,
15 dangerous weapon. It doesn't say purpose. That is
16 true. It says dangerous weapon. Just put
17 dangerous weapon.

18 MR. MORROW: I'll put dangerous
19 weapon.

20 MR. LEWIS: Correct.

21 MR. MORROW: This is the one from
22 Shaffer on prior calculation and design. I know

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1 that was one that you argued quite extensively in
2 State vs. Shaffer case.

3 MR. LEWIS: I guess we're all right.

4 MR. MORROW: The bottom of page 12
5 is the self-defense, which was straight out of OJI.
6 The Defendant is asserting affirmative defense
7 known as self-defense.

8 MR. CONSOLDANE: The only thing that
9 I would request there is that you put everything in
10 caps, put self-defense in caps there.

11 MR. MORROW: Okay.

12 THE COURT: Those will be the
13 instructions with the possible exception that the
14 Court will consider a draft that the Defense may
15 wish to submit about the question of trespass.

16 (OFF THE RECORD)

17 (End of In-chamber discussion at 3:50 p.m.)

18

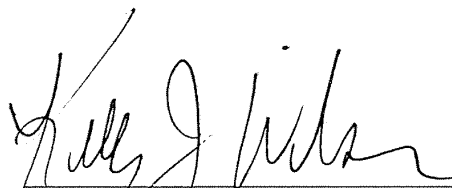
19 (SEE SEPARATE VOLUME FILED BY KELLY WILSON FOR RECORD
20 TAKEN ON WEDNESDAY, NOVEMBER 6, 2002.)

21

22

REPORTER'S CERTIFICATE

This is to certify the foregoing represents a true and correct copy of the proceedings had in the aforementioned cause as reflected by the stenotype notes taken by me on the same.



Kelly J. Wilson
Official Court Reporter

1 IN THE COURT OF COMMON PLEAS

2 TRUMBULL COUNTY, OHIO

3 STATE OF OHIO,)

Case No.2001-CR-794

4 Plaintiff)

5 -vs-)

JUDGE JOHN M. STUARD

6 NATHANIEL E. JACKSON,)

PARTIAL

7 Defendant)

) TRANSCRIPT OF PROCEEDINGS

8 VOLUME 15

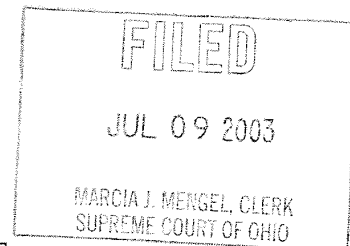
9
10 FINAL ARGUMENTS, CHARGE OF COURT AND VERDICT
11 NOVEMBER 6, 7 and 8, 2002

12 BEFORE: HONORABLE JOHN M. STUARD

13 AT: Trumbull Co. Court of Common Pleas
14 Courtroom Number 2
15 160 High Street, NW
Warren, Ohio 4448116 APPEARANCES:17 On behalf of the Plaintiff:
18 MESSRS. DENNIS WATKINS
and CHARLES L. MORROW
19 Attorneys at Law20 On behalf of the Defendant:
21 MESSRES. JAMES F. LEWIS
and ANTHONY V. CONSOLDANE
22 Attorneys at Law

23 Official Court Reporter: Kelly J. Wilson

03-0137



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Exhibit No.	Description	Admitted
1	911 Tape	Admitted over Obj
1A	911 Paper work	No Objection
2	Crime Scene Video	Objection Sustained
3	Crime Scene Diagram	Admitted over Obj
4	Photo	No Objection
5	Photo	No Objection
6	Photo	Withdrawn
7	Photo	No Objection
8	Photo	No Objection
9	Photo	No Objection
10	Photo	No Objection
11	Photo	No Objection
12	Photo	No Objection
13	Photo	No Objection
14	Photo	No Objection
15	Photo	No Objection
16	Photo	No Objection
17	Photo	No Objection
18	Photo	No Objection
19	Photo	No Objection
20	Photo	No Objection
21	Photo	No Objection
22	Photo	Withdrawn
23	Photo	Withdrawn
24	Photo	No Objection
25	Photo	No Objection
26	Photo	No Objection
27	Photo	No Objection
28	Photo	No Objection
29	Photo	Withdrawn
30	Photo	Withdrawn
31	Photo	No Objection
32	Photo	Withdrawn
33	Photo	No Objection
34	Photo	No Objection
35	Photo	Withdrawn
36	Photo	Withdrawn
37	Photo	No Objection
38	Photo	No Objection
39	Photo	Withdrawn
40	Photo	No Objection
41	Photo	Withdrawn
42	Photo	Withdrawn
43	Photo	No Objection
44	Photo	No Objection
45	Photo	Withdrawn
46	Photo	Withdrawn
47	Photo	No Objection
48	Photo	No Objection
49	Photo	No Objection
50	Photo	Withdrawn
51	Photo	No Objection
52	Photo	No Objection
53	Photo	No Objection
54	Photo	No Objection
55	Photo	No Objection
56	Photo	No Objection
57	Photo	No Objection
58	Photo	No Objection
59	Photo	No Objection
60	Photo	No Objection

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61	Photo Shirt	No Objection
62	Photo Shirt	No Objection
63	Photo - Victim	Withdrawn
64	Bullet Recovered from Brain of Victim	No Objection
65	Bullet Recovered from Brain of Victim	No Objection
66	Clothes and Jewelry	No Objection
67	Photo X-Ray	No Objection
68	Photo Red's Jacket	No Objection
69	Tire Marks in Grass	No Objection
70	N. Side Exterior of House	No Objection
71	Front Exterior of House	No Objection
72	Rear Exterior of House	No Objection
73	S Side Exterior of House	No Objection
74	Main Bathroom	No Objection
75	View of man door screen from house	No Objection
76	View of man door screen from garage	No Objection
77	Spare Bedroom	No Objection
78	Clothing- Spare Bedroom	No Objection
79	Blood spatter - peninsula	Withdrawn
80	Blood Spatters- on wall by door	Withdrawn
81	Blood Spatters and smear	Withdrawn
82	Blood Spatters	Withdrawn
83	Inside Garage looking into residence	No Objection
84	Blood drops - garage	No Objection
85	Garage	Withdrawn
86	Blood Spatters - garage	No Objection
87	Overview garage	No Objection
88	Peninsula & Wall - blood splatters	Withdrawn
89	Different view as in 88	Withdrawn
90	Blood Drops in garage	No Objection
91	Kitchen door closed	No Objection
92	Overview garage	No Objection
93	Back of man door w/ blood	No Objection
94	Interior side of man door	No Objection
95	Eye glasses and broken lag bolt -garage	No Objection
96	Eye glasses - garage	No Objection
97	Stairwell ceiling	No Objection
98	receipt dated 9-26-01	No Objection
99	Victim	Withdrawn
100	Victim -back close up	Withdrawn
101	Small key found under victim	No Objection
102	overview bedroom	No Objection
103	bedroom master	No Objection
104	bedroom closet	No Objection
105	Photo	No Objection
105A	Photo	No Objection
106	Photo	No Objection
106A	Photo	No Objection
107	Photo	No Objection
107A	photo	Withdrawn
108	Victim	No Objection
108A	Victim Face down	Withdrawn
109	Dry Wall Hole	Withdrawn
109A	Victim face down	Withdrawn
110	Victim in Kitchen	No Objection
111	Victim lower torso	Withdrawn
112	Victim - Footprints w/ small dots	Withdrawn
113	Ashtray	No Objection
114	Ashtray	No Objection
115	Living Room	No Objection
116	Living Room	No Objection
117	Living Room	No Objection

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118	Office Area	No Objection
119	Office Area	No Objection
120	Office Area	No Objection
121	Office Area	No Objection
122	Front Door Looking In	No Objection
123	Dining Room - Orioles Jacket	No Objection
124	Office Area w/ ball cap	No Objection
125	Dry Wall Hole	No Objection
126	Front View of Car	No Objection
127	left rear red car	No Objection
128	left view red car	No Objection
129	Garage door & Driver door	No Objection
130	Family Room - overview	No Objection
131	Table w/ 2 roaches	No Objection
132	Garage w/ view of Gun	No Objection
133	Blood Drops in garage	Withdrawn
134	Overview - Office	No Objection
135	Kitchen - Door	Withdrawn
136	Open Door, Kitchen area	Withdrawn
137	Kitchen - receipt Walmart 9:33 p.m.	No Objection
138	Stainless Steel Revolver	No Objection
139	Close - up Footprint & Garage	No Objection
140	Stairwell & Basement	No Objection
141	Stairwell & Basement	No Objection
142	Cabinet	No Objection
143	Close - Up Cabinet	No Objection
144	Kitchen - Different View	No Objection
145	Pier One Import Bag w/ wine glasses	No Objection
146	Front View of Car	No Objection
147	Rt Side View of Car	No Objection
148	Rear view of Car	No Objection
149	Left Side view of Car	No Objection
150	Double Lined Bag "Nate Jackson"	No Objection
151	Receipt - Pier One Import - Lorain Rd	No Objection
152	Assorted Candy, toothpaste	No Objection
153	Customer Receipt	No Objection
154	Handcuff Box w/ key - no cuffs	No Objection
155	Hair Comb	No Objection
156	Front View of Car	No Objection
157	Rear view of Car	No Objection
158	Wide Angle Rear of Car	Withdrawn
159	Rt Side View of Car	No Objection
160	Front View of Car - Left Corner	No Objection
161	Rear view of Car - Damage to Bumper	Withdrawn
162	Front View of Car	No Objection
163	Exterior to Interior - Blood Smears	No Objection
164	Visor Area	No Objection
165	Interior area above head w/ blood	No Objection
166	Exterior	No Objection
167	Front Driver Seat	Withdrawn
168	Visor Area - Removed	No Objection
169	Door Handle	No Objection
170	Door Handle w/ blood	No Objection
171	Driver side visor clamp	No Objection
172	Front Passenger Seat - Cell Phone	No Objection
173	Front Passenger Seat - Cell Phone	No Objection
174	Interior -Left Console	No Objection
175	Napkin w/ Blood Smear	No Objection
176	Floormat	Withdrawn
177	Trunk Open	No Objection
178	Keys in Ignition	No Objection
179	Rt interior head rest	Withdrawn

180	Driver Side Console	No Objection
181	Passenger Side Dashboard	No Objection
182	Passenger side door - interior	No Objection
183	Driver side - steering wheel p garage door opener	No Objection
184	Left side of car w/ dashboard	No Objection
185	Rt side back seat	No Objection
186	Front driver compartment	No Objection
187	Exterior thru rear left door	No Objection
188	keys	Withdrawn
189	Cell Phone	Withdrawn
190	Keys - Blue Matt	Withdrawn
191	Driver side - release button	No Objection
192	Wagon Wheel Photo	Objection Sustained
193	Wagon Wheel Photo	Objection Sustained
194	Wagon Wheel Photo	Admitted over Obj
195	Wagon Wheel Photo	Admitted over Obj
196	Wagon Wheel Photo	Objection Sustained
197	Photograph Items Recovered Days Inn	Admitted over Obj
198	No Exhibit	
199	Days Innn Photographs	Withdrawn
200	Days Innn Photographs	Withdrawn
201	Days Innn Photographs	Admitted over Obj
202	Days Innn Photographs	Objection Sustained
203	Days Innn Photographs	Withdrawn
204	Days Innn Photographs	Objection Sustained
205	Days Innn Photographs	Withdrawn
206	Days Innn Photographs	Withdrawn
207	Days Innn Photographs	Withdrawn
208	Days Innn Photographs	Withdrawn
208	Days Innn Photographs	Withdrawn
210	Days Innn Photographs	Withdrawn
211	Days Innn Photographs	Withdrawn
212	Days Innn Photographs	Withdrawn
213	Days Innn Photographs	Withdrawn
214	Days Innn Photographs	Withdrawn
215	Days Innn Photographs	Withdrawn
216	Days Innn Photographs	Withdrawn
217	Days Innn Photographs	Withdrawn
218	Days Innn Photographs	Withdrawn
219	Days Innn Photographs	Withdrawn
220	Days Innn Photographs	Withdrawn
221	Days Innn Photographs	Withdrawn
222	Days Innn Photographs	Withdrawn
223	Days Innn Photographs	Withdrawn
224	Days Innn Photographs	Admitted over Obj
225	Days Innn Photographs	Withdrawn
226	Days Innn Photographs	Admitted over Obj
227	Photographs of Wirt Street	Admitted over Obj
228	Photographs of Wirt Street	Out
229	Photographs of Wirt Street	Out
230	Photographs of Wirt Street	Admitted over Obj
231	Photographs of Wirt Street	Admitted over Obj
232	Photographs of Wirt Street	Out
233	Wirt Street Photographs	Out
234	Wirt Street Photographs	Admitted over Obj
235	Front view - Nate Jackson	No Objection
236	Rear view Nate Jackson	No Objection
237	Full body shot	No Objection
238	Rt arm and Hand	No Objection
239	Front view - Nate Jackson	No Objection
240	Left & Rt knee	No Objection
241	View of Hands & Wound	No Objection

271D	Letters From Donna to Nate		
271D1		12/03/01	Admitted
271D2		11/29/01	Admitted
271D3		11/29/01	Admitted
271D4		11/28/01	Admitted
271D5		11/28/01	Admitted
271D6		11/27/01	Admitted
271D7		11/27/01	Admitted
271D8		11/26/01	Admitted
271D9		11/26/01	Admitted
271D10		11/24/01	Admitted
271D11		11/23/01	Admitted
271D12		11/23/01	Admitted
271D13		11/22/01	Admitted
271D14		11/22/01	Admitted
271D15		11/22/01	Admitted
271D16		11/22/01	Admitted
271D17		11/21/01	Admitted
271D18		11/21/01	Admitted
271D19		11/20/01	Admitted
271D20		11/20/01	Admitted
271D21		11/20/01	Admitted
271D22		11/20/01	Admitted
271D23		11/19/01	Admitted
271D24		11/19/01	Admitted
271D25		11/19/01	Admitted
271D26	Empty		Admitted
271D27		11/16/01	Admitted
271D28		11/16/01	Admitted
271D29		11/15/01	Admitted
271D30	Empty		Admitted
271D31		11/12/01	Admitted
271D32		11/10/01	Admitted
271D33		11/10/01	Admitted
271D34		11/10/01	Admitted
271D35		11/10/01	Admitted
271D36		11/09/01	Admitted
271D37		11/09/01	Admitted
271D38		11/09/01	Admitted
271D39		11/09/01	Admitted
271D40		11/08/01	Admitted
271D41		11/08/01	Admitted
271D42		11/08/01	Admitted
271D43		11/07/01	Admitted
271D44		11/07/01	Admitted
271D45		11/07/01	Admitted
271D46		11/07/01	Admitted
271D47	Empty		Admitted
271D48		11/06/01	Admitted
271D49		11/06/01	Admitted
271D50	Empty		Admitted
271D51		11/05/01	Admitted
271D52		11/05/01	Admitted
271D53		11/03/01	Admitted
271D54		11/03/01	Admitted
271D55		11/02/01	Admitted
271D56		11/02/01	Admitted
271D57		11/02/01	Admitted
271D58		11/01/01	Admitted
271D59		11/01/01	Admitted
271D60	Halloween card		Admitted
271D61		10/31/01	Admitted

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271D62		10/30/01	Admitted
271D63		10/29/01	Admitted
271D64		10/29/01	Admitted
271D65		10/28/01	Admitted
271D66		10/27/01	Admitted
271D67		10/26/01	Admitted
271D68		10/26/01	Admitted
271D69		10/26/01	Admitted
271D70		10/25/01	Admitted
271D71		10/25/01	Admitted
271D72		10/24/01	Admitted
271D73		10/24/01	Admitted
271D74		10/23/01	Admitted
271D75		10/23/01	Admitted
271D76		10/23/01	Admitted
271D77		10/23/01	Admitted
271D78		10/22/01	Admitted
271D79	Empty		Admitted
271D80		10/21/01	Admitted
271D81		10/20/01	Admitted
271D82		10/20/01	Admitted
271D83		10/20/01	Admitted
271D84		10/20/01	Admitted
271D85		10/19/01	Admitted
271D86		10/19/01	Admitted
271D87		10/19/01	Admitted
271D88		10/19/01	Admitted
271D89		10/18/01	Admitted
271D90	Empty		Admitted
271D91		10/18/01	Admitted
271D92		10/17/01	Admitted
271D93		10/16/01	Admitted
271D94		10/16/01	Admitted
271D95		10/15/01	Admitted
271D96		10/15/01	Admitted
271D97		10/15/01	Admitted
271D98		10/13/01	Admitted
271D99		10/13/01	Admitted
271D100		10/13/01	Admitted
271D101		10/12/01	Admitted
271D102		10/12/01	Admitted
271D103		10/12/01	Admitted
271D104	Empty		Admitted
271D105		10/12/01	Admitted
271D106		10/12/01	Admitted
271D107		10/11/01	Admitted
271D108		10/11/01	Admitted
271D109		10/11/01	Admitted
271D110		10/10/01	Admitted
271D111		10/10/01	Admitted
271D112		10/10/01	Admitted
271D113		10/08/01	Admitted
271D114		10/08/01	Admitted
271D115		10/06/01	Admitted
271D116		10/06/01	Admitted
271D117		10/06/01	Admitted
271D118		10/05/01	Admitted
271D119		10/05/01	Admitted
271D120		10/05/01	Admitted
271D121		10/05/01	Admitted
271D122		10/05/01	Admitted
271D123		10/05/01	Admitted

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271D124		10/05/01	Admitted
271D125		10/04/01	Admitted
271D126		10/04/01	Admitted
271D127		10/02/01	Admitted
271D128		10/02/01	Admitted
271D129		10/02/01	Admitted
271D130	Unknown		Admitted
271D131	Unknown		Admitted
271D132	Unknown		Admitted
271D133	Unknown		Admitted
271D134	Unknown		Admitted
271D135	Unknown		Admitted
271D136	Unknown		Admitted
271D137	Unknown		Admitted
271D138	Unknown		Admitted
271D139		11/26/01	Admitted

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273N	Letters from Nate to Donna	Admitted
273N1	12/01/01	Admitted
273N2	11/30/01	Admitted
273N3	11/29/01	Admitted
273N4	11/28/01	Admitted
273N5	11/27/01	Admitted
273N6	11/26/01	Admitted
273N7	11/25/01	Admitted
273N8	11/23/01	Admitted
273N9	11/22/01	Admitted
273N10	11/20/01	Admitted
273N11	11/19/01	Admitted
273N12	11/17/01	Admitted
273N13	11/16/01	Admitted
273N14	11/14/01	Admitted
273N15	11/14/01	Admitted
273N16	11/13/01	Admitted
273N17	11/12/01	Admitted
273N18	11/12/01	Admitted
273N19	11/10/01	Admitted
273N20	11/09/01	Admitted
273N21	11/07/01	Admitted
273N22	11/06/01	Admitted
273N23	11/08/01	Admitted
273N24	11/05/01	Admitted
273N25	11/03/01	Admitted
273N26	11/01/01	Admitted
273N27	11/01/01	Admitted
273N28	10/31/01	Admitted
273N29	10/30/01	Admitted
273N30	273N31	273N32
273N31	10/28/01	Admitted
273N32	10/27/01	Admitted
273N33	273N34	273N35
273N34	10/25/01	Admitted
273N35	10/25/01	Admitted
273N36	10/25/01	Admitted
273N37	10/24/01	Admitted
273N38	10/23/01	Admitted
273N39	10/22/01	Admitted
273N40	10/21/01	Admitted
273N41	10/21/01	Admitted
273N42	10/20/01	Admitted
273N43	10/19/01	Admitted
273N44	10/18/01	Admitted
273N45	10/17/01	Admitted
273N46	10/16/01	Admitted
273N47	10/16/01	Admitted
273N48	10/15/01	Admitted
273N49	10/14/01	Admitted
273N50	10/12/01	Admitted
273N51	10/10/01	Admitted
273N52	10/10/01	Admitted
273N53	10/08/01	Admitted
273N54	10/05/01	Admitted
273N55	10/07/01	Admitted
273N56	10/04/01	Admitted
273N57	10/04/01	Admitted
273N58	10/02/01	Admitted
273N59	10/01/01	Admitted
273N60	10/01/01	Admitted
273N61	09/30/01	Admitted

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273N62	09/27/01	Admitted
273N63	09/27/01	Admitted
273N64	07/12/01	Admitted
273N65	06/28/01	Admitted
273N66	06/09/01	Admitted
273N67	05/18/01	Admitted
273N68	05/15/01	Admitted
273N69	05/12/01	Admitted
273N70	05/10/01	Admitted
273N71	05/09/01	Admitted
273N72	05/06/01	Admitted
273N73	05/04/01	Admitted
273N74	05/03/01	Admitted
273N75	04/28/01	Admitted
273N76	02/24/01	Admitted
273N77	04/23/01	Admitted
273N78	04/22/01	Admitted
273N79	04/19/01	Admitted
273N80	04/16/01	Admitted
273N81	04/16/01	Admitted
273N82	04/15/01	Admitted
273N83	04/11/02	Admitted
273N84	04/10/01	Admitted
273N85	04/10/01	Admitted
273N86	04/09/01	Admitted
273N87	04/08/01	Admitted
273N88	04/04/01	Admitted
273N89	04/02/01	Admitted
273N90	Unknown	Admitted
273N91	03/31/01	Admitted
273N92	03/29/01	Admitted
273N93	03/26/01	Admitted
273N94	03/25/01	Admitted
273N95	03/23/01	Admitted
273N96	03/22/01	Admitted
273N97	03/20/01	Admitted
273N98	03/20/01	Admitted
273N99	03/20/01	Admitted
273N100	03/19/01	Admitted
273N101	03/19/01	Admitted
273N102	03/19/01	Admitted
273N103	03/19/01	Admitted
273N104	03/15/01	Admitted
273N105	03/13/01	Admitted
273N106	03/12/01	Admitted
273N107	03/11/01	Admitted
273N108	03/09/01	Admitted
273N109	03/06/01	Admitted
273N110	03/04/01	Admitted
273N111	03/03/01	Admitted
273N112	03/02/01	Admitted
273N113	02/27/01	Admitted
273N114	02/25/01	Admitted
273N115	02/20/01	Admitted
273N116	02/23/01	Admitted
273N117	02/22/01	Admitted
273N118	02/19/01	Admitted
273N119	02/16/01	Admitted
273N120	02/15/01	Admitted
273N121	Unknown	Admitted
273N122	02/13/01	Admitted
273N123	02/12/01	Admitted

id - Warden [No Objection]

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273N124		02/09/01	Admitted
273N125		02/07/01	Admitted
273N126		02/04/01	Admitted
273N127		02/01/01	Admitted
273N128		02/01/01	Admitted
273N129		01/26/01	Admitted
273N130		01/19/01	Admitted
273N131		01/17/01	Admitted
273N132		01/21/01	Admitted
273N133		01/16/01	Admitted
273N134		01/12/01	Admitted
273N135		01/05/01	Admitted
273N136		01/01/01	Admitted
273N137		12/27/00	Admitted
273N138		12/27/00	Admitted
273N139	Unknown		Admitted
273N140		12/11/00	Admitted
273N141	Unknown		Admitted
273N142	Unknown		Admitted
273N143		05/01/01	Admitted

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242	Left Hand - Wound	No Objection
243	Front view w/ bandage	No Objection
244	Side view Finger	No Objection
245	Left Hand - wrist to finger tip	No Objection
246	Left Hand Palm up	No Objection
247	Back side of Hand	No Objection
248	Both Hands	No Objection
249	Head and Shoulders	Admitted over Obj
250	Full body shot	Objection Sustained
251	Handgun - .38 Taurus	No Objection
252	Five (5) Live Rounds from Taurus	No Objection
252A	Envelope Containing Test Fire Rounds	No Objection
253	Right Eye glass Lens	No Objection
254	Eye glasses Missing Right Lens	No Objection
255	Cotton Swab - Front Door Hallway	No Objection
256	Dry Wall Cut out w/ Bullet Hole	No Objection
257	Bullet Recovered from Dry Wall	No Objection
258	Cincinnati Red's Jacket - From Victim	No Objection
259	Bullet Recovered from Clothing of Victim	No Objection
260	Death Certificate	No Objection
261	Coroner's Verdict	No Objection
262	Autopsy Protocol - 11 pages	No Objection
263	Microscopic Examination	No Objection
264	Toxicology - 1 page Front and Back	No Objection
264A	Radiology Report	No Objection
265	Blood - Drawn from Robert Fingerhut	No Objection
266	Bullet Recovered from Brain of Victim	No Objection
267	Driver's Side Visor	No Objection
268	Visor Clamp	No Objection
269	Keys Recovered from Ignition	No Objection
270	Bag Containing Letters	No Objection
271	Letters from Donna to Nate (See attached)	No Objection
272	No Exhibit	
273	Letters from Nate to Donna (See Attached)	No Objection
274	No Exhibit	
275A	Hand Writing Analysis	Admitted over Obj
275B	Hand Writing Analysis	Admitted over Obj
276A	Hand Writing Standard	No Objection
276B	Hand Writing Standard	No Objection
276b1	CCA Records	No Objection
276B2	CCA Records	No Objection
276B3	CCA Records	No Objection
276B4	CCA Records	No Objection
276B5	CCA Records	No Objection
276B6	CCA Records	No Objection
276B7	CCA Records	No Objection
276C	Hand Writing Standard	No Objection
276C1	Prison Records	No Objection
276C2	Prison Records	No Objection
276C3	Prison Records	No Objection
276C4	Prison Records	No Objection
277	01-35755- Two (2) pages	No Objection
278	01-35755-A	No Objection
279	01-35755-B	No Objection
280	01-35755-C	No Objection
281	01-35755-D	Admitted over Obj
282A	01-35755 - Mike Roberts (2) Pages	No Objection
282B		Not Introduced
282C	01-35755 - Mike Roberts Supplemental	No Objection
283	01-35755 - Cindy Maylee (2) Pages	No Objection
284	Dale Laux - (2) Pages	No Objection
285	Steve Green (1) Page	Admitted over Obj

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286A	Brenda Gerardi (3) Pages	No Objection
286B		Not Introduced
286C	Brenda Gerardi Supplemental 1 Corrected (2) Pages	No Objection
286D	Brenda Gerardi Supplemental 2 - (3) Pages	No Objection
287	Plastic Bag With Three (3) Boxes of Swabs	Withdrawn
287A	Box Containing Blood Swab - Days Inn	Withdrawn
287B	Box Containing Blood Swab - Days Inn	Withdrawn
287C	Box Containing Blood Stain - Days Inn	Withdrawn
288	Wash Cloth - Days Inn - Days Inn	Withdrawn
289	Hand Towel - Days Inn	Withdrawn
290	Tape Lifts - Hairs Toilet	Withdrawn
291	Finger Print Cards - Jennifer Robinson	Withdrawn
292	White Stain Napkins from Dumpster	Withdrawn
293	Dish Cloth - From Dumpster	Withdrawn
294	Dressing from Dumpster	No Objection
295	Dressing from Dumpster	Withdrawn
296	Dressing and Tape from Dumpster	Withdrawn
297	White Stain Napkins	Withdrawn
298	Stained White Wash Cloth	Withdrawn
299	One (1) Condom	Withdrawn
300	One (1) Condom	Withdrawn
301	Hydrogen Peroxide Bottle	Withdrawn
302	Empty Package for Bandage	Withdrawn
303	Empty First Aid Tape Box	Withdrawn
304	Empty Bandage Roll	Withdrawn
305	Empty First Aid Sponge Package	Withdrawn
306	Empty First Aid Sponge Package	Withdrawn
307	Empty First Aid Sponge Package	Withdrawn
308	Empty First Aid Sponge Package	Withdrawn
309	Empty Days Inn Room Key Card Enevioppe #29	No Objection
310	Empty Days Inn Room Key Card Enevioppe #138 w/ To	Withdrawn
311	Envelope Containing Receipts	Admitted over Obj
311A	Check Inn	Admitted over Obj
311B	Credit Card Receipt	Admitted over Obj
311C	Register Audit	Admitted over Obj
311D	Phone Log	Admitted over Obj
311E	Credit Card Receipt	Admitted over Obj
312	Check Inn	No Objection
313	Photographic Line -Up Jose Flores	No Objection
314	Evevioppe Containing Guest Log (5) pages	No Objection
314A	Guest Log	No Objection
314B	Guest Log	No Objection
314C	Guest Log	No Objection
314D	Guest Log	No Objection
314E	Final Bill	No Objection
315	Guest Check	No Objection
316	Photographic Line - Up Jill Kenyon	No Objection
317	Black Gloves	No Objection
318	Black & Red Nike Tennis Shoes	No Objection
319	Composite Video Tape	Admitted over Obj
320	Enevioppe Containing 9 Photos	Admitted over Obj
320A	4 X 5 Black and White Photo	Objection Sustained
320B	4 X 5 Black and White Photo	Objection Sustained
320C	4 X 5 Color Phot	Objection Sustained
320D	4 X 5 Color Photo	Admitted over Obj
320E	8 1/2 X 11 Photo	Withdrawn
320F	8 1/2 X 11 Photo	Withdrawn
320G	8 1/2 X 11 Photo	Withdrawn
320H	8 1/2 X 11 Photo	Withdrawn
320I	8 1/2 X 11 Photo	Admitted over Obj
321	Dobson Communication Phone Records 17 pages	Admitted over Obj
322	\$250,000 - ZurichLife Insurance Policy 24 pages	Admitted over Obj

Containing Lift Sheet	323	\$300,000 - State Farm Insurance Policy 17 pages	Admitted over Obi
	324	Constitutional Rights Waiver	No Objection
	325	Video Tape Confession	No Objection
	326	Transcript of Video Tape Confession 38 Pages	No Objection
	327A	Certification - ATF - 1page	Admitted over Obi
	327B	Taurus IL46854 - 2 pages	Admitted over Obi
	327C	Taurus JH14188 - 1 page	Admitted over Obi
	360	Cd containing 19 Telephone Conversations	No Objection
	361	Telephone Log Record 3 pages	No Objection
	362	Audio Tape of 10-05-01 Recording	No Objection
	362A	Transcript of 10-05-01 Recording	No Objection
	363	Audio Tape of 10-25-01 Recording	No Objection
	363A	Transcript of 10-25-01 Recording	No Objection
	364	Audio Tape of 10-27-01 Recording	No Objection
	364A	Transcript of 10-27-01 Recording	No Objection
	365	Audio Tape of 11-03-01 Recording	No Objection
	365A	Transcript of 11-03-01 Recording	No Objection
	366	Audio Tape of 11-08-01 Recording	No Objection
	366A	Transcript of 11-08-01 Recording	No Objection
	367	Audio Tape of 11-10-01 Recording	No Objection
	367A	Transcript of 11-10-01 Recording	No Objection
	368	Audio Tape of 11-11-01 Recording	No Objection
	368A	Transcript of 11-11-01 Recording	No Objection
	369	Audio Tape of 11-15-01 Recording	No Objection
	369A	Transcript of 11-15-01 Recording	No Objection
	370	Audio Tape of 11-17-01 Recording	No Objection
	370A	Transcript of 11-17-01 Recording	No Objection
	371	Audio Tape of 11-22-01 Recording	No Objection
	371A	Transcript of 11-22-01 Recording	No Objection
	372	Audio Tape of 11-24-01Recording	No Objection
	372A	Transcript of 11-24-01 Recording	No Objection
	373	Audio Tape of 11-24-01Recording	No Objection
	373A	Transcript of 11-24-01 Recording	No Objection
	374	Audio Tape of 11-25-01 Recording	No Objection
	374A	Transcript of 11-25-01 Recording	No Objection
	375	Audio Tape of 11-29-01Recording	No Objection
	375A	Transcript of 11-29-01 Recording	No Objection
	376	Audio Tape of 12-01-01Recording	No Objection
	376A	Transcript of 12-01-01 Recording	No Objection
	377	Audio Tape of 12-02-01Recording	No Objection
	377A	Transcript of 12-02-01 Recording	No Objection
	379	Audio Tape of 12-06-01Recording	No Objection
	379A	Transcript of 12-06-01 Recording	No Objection
	380	Audio Tape of 12-08-01Recording	No Objection
	380A	Transcript of 12-08-01 Recording	No Objection
	381	Audio Tape of 12-08-01Recording	No Objection
	381A	Transcript of 12-08-01 Recording	No Objection
	349	Photographic Line-Up - Frank Reynolds	Not Introduced
	350	Consent to Search - Wirt Street - Shelia Fields	No Objection
	351	(2) two cotton tipped swabs	No Objection
	352	Search Warrant for Oral Swabs and Photographs	Withdrawn
	385	Swabs	No Objection
	386	Swabs	No Objection
	387	Swabs	No Objection
	388	Swabs	No Objection
	389	Swabs	No Objection
	390	Gerardi - Cutting	No Objection
	391	Envelope Containing Jackson Prints	No Objection
	391A	Jackson Prints	No Objection
	392	Photograph - Lifts	No Objection
	393	Photograph - Lifts	No Objection
	394	Envelope Containing 2 Photos	No Objection

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395	Envelope Containing Lift Sheets	No Objection
395A	Lift Sheets	No Objection
395B	Lift Sheets	No Objection
396	Walmart Receipt	Admitted over Obj
397	Audio Tape of Excerpts	Objection Sustained
397A	Transcript of Audio Tape Excerpts	Objection Sustained
398	Preston Automobile Service Records Red Chrysler	Admitted over Obj
398 A-P	Preston Automobile Service Records Red Chrysler	Admitted over Obj
399	Preston Automobile Service Records Silver Chrysler	Admitted over Obj
399 A-J	Preston Automobile Service Records Silver Chrysler	Admitted over Obj
400	Trumbull County Recorder 494 Olive Street	Admitted over Obj
400 A-C	Trumbull County Recorder 494 Olive Street	Admitted over Obj
401	Trumbull County Recorder Washington Street	Admitted over Obj
401 A-D	Trumbull County Recorder Washington Street	Admitted over Obj
402	Trumbull County Recorder - Fonderlac	Admitted over Obj
402 A-F	Trumbull County Recorder - Fonderlac	Admitted over Obj
403A-403RR	Defendant's school records	No Objection
Defendant's Exhibits		
Deft A	Deft's Criminal History	No Objection
Deft B	Contains 9 subparts of Blood Swabs	No Objection
Deft F	Credit Application	No Objection
Deft G	BMV Registration Card	No Objection
Deft H	Sales Agreement	No Objection
Deft I	Lease Agreement	No Objection
Deft J	Car Registration	No Objection
Deft K	Credit Application	No Objection
Deft L	BMV Registration Card	No Objection
Deft M	Real Estate Records	No Objection
Deft N	Real Estate Records	No Objection
Deft O	Real Estate Records	No Objection
Deft P	Psychological Report	No Objection
Joint 1	Fingerhut Jewelry	No Objection
Court Exhibit 1 Orientation Instructions		
Court Exhibit 2 Exhibit List		
Court Exhibit 3 Brief in Opposition to Acquittal		
Court Exhibit 4 Jury Charge		
Court Exhibit 5 Corrected Instruction		
Court Exhibit 6 Jury Question		
Court Exhibit 7 Penalty Instruction		

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1 (NOVEMBER 6TH, 2002)

2 (Whereupon, Court's Exhibit No. 2 and

3 Joint Exhibit No. 1 were marked for identification.)

4 THE COURT: Court's Exhibit 2 was marked

5 and it is submitted by the State and is reflective of the

6 previous record, and Joint Exhibit 1.

7 (Whereupon, a brief recess was taken,

8 after which the following proceedings occurred outside the

9 presence of the jury.)

10 THE COURT: Mr. Consoldane, I believe you

11 had a motion that you wish to put on the record before we

12 begin closing arguments.

13 MR. CONSOLDANE: Yes, Your Honor. The --

14 yesterday before when we left and walked out of here and I

15 had my notes and inadvertently forgot to request the Court

16 that I wanted a charge on unauthorized use of a motor vehicle

17 pursuant to Ohio Revised Code section 2913.03, and I had

18 called the prosecutors and made that request. I think by the

19 evidence introduced in court, No. 1, the letters that the

20 prosecutor introduced in court, Donna gave Nate permission to

21 drive the cars and she owned the car, albeit though that he

22 took it and left it in Youngstown, I think that could be the

23 elements of unauthorized use. That he didn't have --

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1 although he had permission generally to use the car, that it
2 could be they can argue that specifically at that time he did
3 not have permission to use it.

4 MR. WATKINS: Your Honor, I believe that
5 the various conversations in the letters, and there may be
6 one on the tape, deal with Donna saying that she was going to
7 give Nate anything he wants, anything from a Cadillac to a
8 Lincoln, and further that he could, he could have anything
9 she had, including the cars. And in the context of all the
10 letters there's only one reasonable conclusion, that that was
11 made plain, that it was after Nate killed the victim.

12 MR. CONSOLDANE: Your Honor, I disagree
13 with that. That does not --

14 THE COURT: Well, --

15 MR. CONSOLDANE: That's his speculation.

16 MR. WATKINS: Let him point to the
17 evidence.

18 THE COURT: We discussed this yesterday
19 when we were going over it. I thought we had settled the
20 issue, but apparently not. I think the facts here do not
21 raise the question of whether or not there was an
22 unauthorized use of the vehicle, it was either factually a
23 situation where there was a theft of the automobile or there

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1. It wasn't. The reference to the letters and the automobiles and
2. the evidence that has been put in does not raise the question
3. where a reasonable mind could interpret that facts, those
4. facts to come up with a conclusion that this was an
5. unauthorized use of a motor vehicle.

6. Your motion is on the record and we had discussion
7. on the record yesterday about the thing. That is my ruling
8. on the matter.

9. Does the defense have anything further you wish to
10. place on the record prior to closing?

11. MR. CONSOLDANE: Well, only, Your Honor,

12. that I would reserve some time to go over these jury
13. instructions they just handed me. They changed quite a bit.

14. THE COURT: Well, that's no problem. We
15. can do that.

16. MR. CONSOLDANE: So, I mean, I just want
17. to review it.

18. THE COURT: For the record I would say
19. that we went over them in great detail yesterday and there
20. were changes to be made. Those have been made over the
21. course of the last evening and been presented this morning to
22. the defense. They have not had an opportunity to read them
23. and have a right to do so. I would hope that it doesn't take

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1 up much of the morning because I would like to get this
2 going, but that's up to you.

3 THE COURT: No. Mr. Watkins, do you have anything further?

4 MR. WATKINS: Yes, Your Honor. I'm
5 prepared to offer Black's Law Dictionary and other
6 dictionaries dealing with definitions, that in opening
7 statement I was interrupted many times or several times
8 dealing with particularly three issues. One, and I corrected
9 myself when I said that they were married; that is, that
10 Robert Fingerhut and Donna Roberts were not married.

11 However, in the application for insurance, in the 911 tape
12 and virtually all the witnesses, they were holding themselves
13 out as married. That to me is factual. That's something
14 that I can argue to the jury with the caveat that I want to
15 make it clear that they were not legally married but they
16 were holding themselves out --

17 THE COURT: If I'm not mistaken, I think
18 there was a stipulation that these folks were not man and
19 wife at law.

20 MR. LEWIS: They weren't. They're
21 divorced.

22 THE COURT: Yeah. They --

23 MR. CONSOLDANE: Your Honor, --

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1 MR. WATKINS: Your Honor, I am not, I'm
2 not even arguing that.

3 THE COURT: No. I'm just saying that's
4 more for the defendant's response at this point. That was
5 stipulated right at the beginning of the trial when this came
6 up that they were not legally married, but there is evidence
7 contained in it that they held themselves -- the last witness
8 that testified here the other day, Mr. Roberts. So what is

9 your point on --

10 MR. WATKINS: My point is I'm going to
11 argue exactly what the evidence is and I don't think I should
12 be objected when I say people believed they were married and
13 that Donna said that was her husband on 911 or whatever.

14 Anything that's in the record, I'm entitled to argue the
15 record. And it's relevant because the intent here of the
16 declarant is relevant dealing with --

17 THE COURT: You're anticipating the
18 defense every time you --

19 MR. WATKINS: Well, they did before.

20 THE COURT: -- say something to the effect
21 of the husband or wife or something like that.

22 MR. WATKINS: Right.

23 MR. CONSOLDANE: And I will again. You

1 know, I mean, if he says it again I'm going to object. I was
2 chastised by the -- I even had to answer a grievance because
3 I didn't object when something was said wrong in final
4 arguments.

5 MR. WATKINS: They can make their
6 objection.

7 MR. CONSOLDANE: Your Honor, they did away
8 with the common law marriage in Ohio. There is no such thing
9 now as common law marriage in Ohio. You, you know, when you
10 hold somebody out, you say this is your wife, it doesn't
11 matter. It's not an issue anymore and he knows that it's not
12 an issue in common -- there is no common law marriage and he
13 can't say wife. He can say ex-wife, he can say lover, he can
14 say friend, but he can't say wife because that would be
15 misleading the jury.

16 THE COURT: Well, not if the jury is aware
17 of the situation.

18 MR. CONSOLDANE: Yes. I don't care, Your
19 Honor. If he says something wrong --

20 THE COURT: What it boils down to is how
21 does the State or the defense refer to these folks? It's
22 only common, only to be expected that those terms are going
23 to at some point from either side, or both perhaps, come in.

1 The only way that that can be avoided is to refer to them by
2 Mr. Fingerhut or Robert or Donna rather than using the term
3 husband and wife. I don't know that that's so critical if
4 the jury is made aware, they are aware, these folks were not
5 legally married.

6 I don't wish to have this case -- you know, there's
7 nothing worse for either side on opening or closing than to
8 have an objection. Sometimes it's necessary. I know you
9 feel it's necessary here.

10 MR. CONSOLDANE: Well, Your Honor, I mean,
11 I had -- they filed a grievance, I had a grievance filed
12 because I didn't object in a case right downstairs here, that
13 the prosecutor kept saying things on the record and I
14 objected once and it was sustained and I thought that was
15 enough. And I try not to object in final argument. I had to
16 answer to the State Bar Association for ineffective
17 assistance of counsel that I didn't argue enough, I didn't
18 object enough in final argument.

19 THE COURT: Well, let me assure you, in my
20 opinion, that won't be the case here. You've objected
21 sufficiently to avoid that problem.

22 MR. WATKINS: Well, Your Honor, I think
23 that there is precedent that if the Court would rule

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1 something; counsel can say it's a continuing objection and
 2 then there is not a problem. My only point here I'm trying
 3 to say is that Donna applied on the insurance policy that she
 4 was married. That's a fact.

5 THE COURT: Mr. Watkins, there is no
 6 question you have a right to argue the facts.

7 MR. WATKINS: That's all I'm asking, Your
 8 Honor.

9 THE COURT: Well, I don't. THE COURT: On several occasions they were
 10 holding out as husband and wife.

11 MR. WATKINS: That's all I'm going to say.

12 I'm not going to say they are, I'm saying that they held --

13 THE COURT: I think his objection is that
 14 if you continually refer to them as husband and wife.

15 MR. WATKINS: I'm not going to.

16 THE COURT: Okay. I'm going to at this
 17 point, with that in mind, state on the record that this has
 18 been a continuing objection voiced by the defense throughout
 19 this trial. I'm going to ask that that not continue during
 20 the closing argument, unless the State abuses that term you,
 21 of course, have the right to object. I will probably stop
 22 them if that happens.

23 MR. CONSOLDANE: Your Honor, okay, that's

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1 fine. I wish then for the record to just note my continuing
2 objection.

3 THE COURT: You have a continuing
4 objection to the fact that these folks are not husband and
5 wife.

6 MR. CONSOLDANE: You know, this issue is
7 not relevant to the murder, you know, and it is nothing but
8 trying to pull something over on the jury.

9 THE COURT: Well, I don't know that, I
10 don't know that I agree with the statement that it isn't
11 relevant to the case because I think their relationship on
12 several levels is very important. But you have the right to
13 not have -- to have the State not try to project the fact
14 that they were husband and wife because the jury knows now,
15 as well as we do, that that they were not legally man and
16 wife, but they were holding out quite apparently as to that
17 being the situation.

18 MR. CONSOLDANE: Well, then, Your Honor, I
19 would ask that you also remind them again in the jury
20 instructions that they were not legally married.

21 THE COURT: I will do that before, before
22 you begin your closing argument. Anything else?

23 MR. WATKINS: Yes, Your Honor. I am going

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1 to refer to the residence, the house, as his and I'm going to
2 refer to the car as his. And I think that, one, the
3 definition of ownership shows possession and I should be able
4 to argue that he's driving his car home from work. That is
5 his car under the law.

6 THE COURT: I would advise the jury --

7 MR. WATKINS: They can argue the other
8 way.

9 THE COURT: -- before opening statements
10 that, I believe it was stipulated, they are not legally
11 husband and wife. The jury has evidence before it that Donna
12 was the legal title holder and they have to conclude whether
13 or not he had a possessory interest. That's one of the
14 things the jury has to decide here.

15 MR. WATKINS: Yeah.

16 MR. CONSOLDANE: Well, Your Honor, he can
17 argue it but I don't believe he can just come out and just
18 say it. He can say that -- he can argue and say that that
19 was the car that he drove, but why can't he refer to Donna
20 Roberts as Donna Roberts, the silver Chrysler as the silver
21 Chrysler and the house as 233 Fonderlac?

22 MR. WATKINS: Because factually it's his,
23 and you can argue otherwise.

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1 THE COURT: I have to agree, you have the
2 right to counter argument that --

3 MR. WATKINS: And home, and home and house
4 is synonymous for residence.

5 THE COURT: That's the State's theory of
6 the case.

7 MR. WATKINS: And they can argue the
8 other, but I'm allowed to argue without interruption.

9 THE COURT: And your theory is it was not
10 his automobile.

11 MR. LEWIS: All right. Judge, we want a
12 blanket objection any time he refers to or uses possessive
13 pronouns with regard to any of these items, whatever. If he
14 doesn't preface it with "It's our theory" or "We believe the
15 evidence will show," or whatever, if he just goes ahead and
16 says, well, he went to his house, he got in his car,
17 whatever, that's a different animal. We're objecting to all
18 of that. We're going on the record right now with a
19 continuing objection any time he gets into that situation.

20 THE COURT: Here's where we disagree,
21 James, and your objection is again noted, the theory of their
22 case is that this was his automobile.

23 MR. LEWIS: I understand that, judge. I

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1 just want to protect the record because we are going to

2 get --

3 I'm cry3ag no do.

THE COURT: I'm saying that you are

4 protecting the record right now, you have a continuing

5 objection, but there's no sense to every time he uses a

6 pronoun that you disagree with you're going to have an

7 objection. We'll never get through this thing. You are

8 objecting. It's clear on the record what your objection is.

9 I'm allowing your objection. I'm overruling it for the

10 purpose of allowing this to proceed.

11 Now, if he starts, whoever is arguing for the State,

12 to misquote the factual presentation to the jury, then, of

13 course, you have the right to object. But as long as he

14 stays within the terms of the theory of their case, then I'm

15 asking that you not object every time that that reference is

16 made.

17 MR. LEWIS: Okay, judge, that's the

18 relevance. But the problem, the problem really here is this,

19 he's telling the Court up front "I'm going to go ahead and do

20 this," all right. And the point is he knows what he's doing,

21 he can stop from doing it, but he's going to tell the Court

22 "I can go do this anyhow," and that's what this is. Getting

23 really, really out of hand.

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1 THE COURT: No, he's not telling the Court
2 anything. He has requested the Court to make a ruling on it
3 and that's what I'm trying to do.

4 MR. LEWIS: Then phrase it the way it's
5 allowed.

6 MR. WATKINS: That's the way it's allowed,
7 James. I'm prepared to argue the law.

8 MR. LEWIS: All right.

9 THE COURT: The State has the right to
10 argue the theory of their case as the defense has the right
11 to argue the theory of their case, and if that requires the
12 use of these objectionable terms, so be it. The jury has to
13 make the decision. The jury, as I said, I will inform. They
14 already know from the evidence. There's a question of
15 titles --

16 MR. CONSOLDANE: We would, we would also
17 then request a jury instruction indicating to the jury that
18 the legal title holder to the house and the cars is Donna
19 Roberts. I mean, if they're going to cause this gray area to
20 come up, I think that we need to have that in the charge of
21 the court, you know, on the final jury instructions that --

22 THE COURT: There is no dispute on that
23 that I have heard.

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1 MR. CONSOLDANE: Yeah, but I just, I want
2 -- I just, if you would put that in the final instructions to
3 the jury, that Donna Roberts was the legal title holder to
4 the Fonderlac residence and both, both Chryslers.

5 THE COURT: I think that's --

6 MR. WATKINS: That's a fact.

7 THE COURT: -- an infringement on the
8 Court's part on the function the jury. The jury is called
9 upon, there is no evidence rebutting the fact that she was
10 title holder. There's probably many other things in this
11 case that I could instruct the jury as a matter of law. I
12 don't think it's proper to do that. The Court is not to
13 interfere with the function of the jury on the finding of
14 fact. I will overrule that motion.

15 MR. CONSOLDANE: So you're going to allow
16 them to set up a ruse in front of the jury that he is the
17 owner of the car and not clear it up and say that --

18 THE COURT: No, you are mistaken from what
19 I've said. I've told you that I --

20 MR. WATKINS: Your Honor, he just
21 misquoted the law. The law says an owner includes a
22 possessor. That's the law. He is perverting the law right
23 now.

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1 THE COURT: Well, I don't think that --

2 MR. CONSOLDANE: I'm not. I think that's

3 more of a perversion than possessor is. The title owner is
4 the owner of the property, and I don't know why that it's so
5 a problem for the Court to instruct the jury that evidence
6 has been introduced to show who the legal title holder of the
7 automobile and the real estate is.

8 MR. WATKINS: But that's not in dispute.

9 THE COURT: I think we're arguing a paper
10 tiger here. I don't think that this is -- the definition of
11 owner is not limited to title holder by law. That's a
12 statute. I can't change the statute.

13 MR. CONSOLDANE: All I'm asking is for the
14 Court to instruct the jury that evidence has been produced to
15 show who the title holder, who the legal title holder is to
16 the real estate and the automobiles.

17 THE COURT: And there's no evidence to
18 rebut that, I agree, but they still have the power, if not
19 the right, to make a finding that she was not the title
20 holder. The jury is the complete finder of fact. Whatever
21 they find, unless there's some wrongdoing on the jury's part
22 during deliberations, their finding is supreme to anything
23 else that occurs in this case.

1 Do you have anything further?

2 MR. CONSOLDANE: No.

3 THE COURT: The State?

4 MR. WATKINS: I would just like to have a

5 couple minutes, Your Honor, and I will be ready.

6 THE COURT: Yeah. Well, Tony wants to

7 look over these. Please do this as quickly as possible so we

8 can get the jury up here.

9 (Whereupon, a brief recess was taken.)

10 (Whereupon, the following proceedings

11 occurred with only the Court and stenographer present.)

12 THE COURT: For the record, I think the

13 State has filed this brief in opposition, but part of the

14 rulings that the Court made are based on case law that was

15 submitted by the State that's contained in that brief. If

16 they have not filed it I will mark this as the Court's

17 Exhibit for the purpose of those cases.

18 (Whereupon, Court's Exhibit No. 3 was

19 marked for identification.)

20 (Whereupon, a brief recess was taken,

21 after which the following proceedings occurred in open

22 court.)

23 THE COURT: Good morning, everyone.

1 (Whereupon, the jury responded).

2 THE COURT: You have heard all the
3 evidence that will be presented in this case. You are now
4 going to listen to the closing arguments of counsel. I would
5 again remind you that what you're about to hear is not
6 evidence, that this is the last opportunity that both sides
7 have to address you directly, and the purpose is for them to
8 give you their thoughts on what they feel the evidence does
9 show.

10 Closing arguments are, like opening statements, I
11 think a very important part of the case because it gives you
12 the benefit of viewing things as both sides see some of the
13 evidence. That adds to your knowledge so that when you get
14 back into the jury room you have that to draw upon. But I
15 must again advise that what you're about to hear is not
16 evidence. You have to apply what they say to the evidence
17 that was presented, okay?

18 Is the State ready to proceed?

19 MR. WATKINS: Yes, Your Honor.

20 THE COURT: Okay. You may do so.

21 FINAL ARGUMENT ON BEHALF OF THE STATE OF OHIO

22 MR. WATKINS: Thank you, Your Honor.

23 Mr. Monroe, Paul, Mr. Lewis, Mr. Consoldane, Your Honor,

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1 ladies and gentlemen of the jury: It's been almost a month
2 since we started this case. The Court has carefully asked
3 questions of you, as counsel also followed, so we can
4 determine whether or not you could be jurors in this case.
5 Maybe after going through this you might question the
6 desirability of going through what you've gone through and
7 what you are going through, but I think you all understand
8 the importance.
9 You've taken time out of your lives to decide the
10 fate of this defendant, who is presumed innocent, who, as you
11 understand, the State must prove is guilty on every charge,
12 and prove beyond a reasonable doubt. We are in the courtroom
13 today because there is a person that can't sit; there is a
14 victim, Robert Fingerhut. The balance is in your hands. The
15 State, if it can prove its case beyond a reasonable doubt as
16 to the charges, there is justice. If the State does not
17 prove its case beyond a reasonable doubt and the defendant is
18 acquitted, there is justice. But the quality of life in our
19 community depends on jurors doing justice. Both sides are
20 entitled to have a fair trial.

21 The indictment in this case charges the defendant
22 with two counts of aggravated murder. The first count
23 charges that the defendant, with prior calculation and

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1 design, purposely caused the death of Robert Fingerhut, age
2 56, who lived at 254 Fonderlac in Howland Township, Trumbull
3 County, Ohio. His Honor will instruct you that we need to
4 prove beyond a reasonable doubt that the crime occurred in
5 Trumbull County where Mr. Monroe was employed. That's
6 uncontroverted.

7 It is uncontroverted that we have a victim that was
8 killed with three shots from a firearm. There are a lot of
9 facts in this case that are uncontroverted.

10 When we proceeded in this case we told you that we
11 would have a number of witnesses. We had 33 witnesses. His
12 Honor has ruled that hundreds of exhibits are going to be for
13 your review. Now, when considering the charges obviously
14 this includes a lot of evidence. For example, the letters
15 that this man wrote to Donna Roberts are important. I will
16 go through in the next hour or so dealing with what I think
17 is important about what he wrote.

18 Also in this case you will have letters from Donna
19 Roberts. They are important. They show the communication,
20 the State of mind, and they prove what happens and why it
21 happens.

22 You will also have a recorder, a player, so you can
23 listen to tapes. As you can recall, one of the last exhibits

1 that we presented to you was a compilation of four or five
2 conversations between the defendant and Donna Roberts. Those
3 copies of 4 are going to be with you in the jury room, but it's not the
4 tape that was played in court. It will be 19 separate
5 cassettes that are 10 minutes long, and there are transcripts
6 of that that go along with the recordings that you can have
7 and review. Obviously it's important to the State that you
8 fully and fairly consider our evidence.

9 Aggravated murder I describe. His Honor, first off,
10 His Honor will instruct you, and that's the end of the case
11 before you deliberate, and the jury instructions of the law
12 will go with you to the jury room. Therefore, if there's
13 some question as to the law you will be able to review the
14 jury instructions because what I am telling you now and what
15 I'm going to go into as far as the evidence, as His Honor has
16 pointed out, is my opinion, it's not the facts. It's what I
17 believe the evidence shows beyond any reasonable doubt. I
18 believe this evidence and it's my opinion. And when defense
19 counsel follows their presentation is their opinion also,
20 it's not the facts. The facts are the witnesses.

21 Now, His Honor allows both sides to comment on the
22 law in the sense that we have to prove that these charges
23 have been proven, that is the elements of each and every

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1 charge have been proven. And I want to mention that, as you
2 are aware from opening statements -- and by the way, both
3 sides have copies of the opening statement, which was typed
4 up by the court reporter, and we made promises to you in
5 opening statement. And I will go through what I believe we
6 have produced and I will comment upon, as defense will
7 comment upon my comments, what defense counsel said the
8 evidence was going to show. I believe what the defense said
9 was not shown in any way.

10 Now, the charges specifically, aggravated murder I
11 talked about, that's premeditated in the sense there has to
12 be prior calculation and design. His Honor is going to
13 define that for you. But basically common sense will tell
14 you, you watch TV, you have what is known as premeditated
15 murder, but if somebody walks up and takes a gun out and
16 spontaneously shoots someone, that's known as murder. But if
17 someone with a mental design and plan and takes an effort to
18 get the means for committing the crime, and it doesn't have
19 to even be hours, it could be minutes where you could have a
20 premeditated murder, and the judge will instruct you, but it
21 certainly means there's more than just intentionally killing.
22 It means there's some plan, a mental design, to take human
23 life. Shortly I will go through the evidence that this plan

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1 was in months. This defendant was talking and encouraging,
2 along with Donna Roberts, to kill the victim for everything
3 that was available, and that meant, and I will go through
4 evidence, there's \$550,000 of life insurance.

5 Now, on the first charge there are two
6 specifications. As you are aware from Judge Stuard's
7 empaneling process where we participated, that in order to
8 get to any second stage, this is the stage you determine
9 guilt, you must consider the aggravating circumstances. In
10 this case on the first count, prior calculation and design
11 aggravated murder, there are two specifications; aggravated
12 burglary and aggravated robbery.

13 On the second count, same murder, same date,
14 December 11th, 2001, the State has charged that the defendant
15 purposely took the life of the victim, Robert Fingerhut,
16 while committing or attempting to commit aggravated burglary
17 and aggravated robbery. The same two specifications are
18 contained in the second count. So this jury will have a
19 charge that will mean that you have to determine guilt or
20 innocence on the first count of aggravated murder and two
21 specifications, guilt or innocence on the second count of
22 aggravated murder, and guilt or innocence on the two
23 specifications, which are the same on the second count of

1 aggravated murder. That's all in the charge.

2 The third and fourth counts are the crimes of
3 aggravated burglary and aggravated robbery, and there's also
4 a specification of a firearm which you must consider.

5 Now, the question of elements I'm going to go into
6 shortly, but I would like you to know that His Honor will
7 also include in the charge definitions of proof beyond a
8 reasonable doubt, we discussed that, credibility of
9 witnesses, and that's important. I think that you could
10 understand that people who are telling stories or testifying,
11 you have to judge their demeanor, whether they had an
12 interest in the case, whether or not they were in the
13 position to see and know what they testified to, and the
14 general tests that Judge Stuard will discuss with you in the
15 charge.

16 We believe that our evidence from our witnesses is
17 solid as a rock, that our witnesses had no interest to come
18 in this court and tell anything but the truth. And that's
19 what we believe our evidence will show, the truth. Whether
20 it's the pathologist, whether it's the people that worked at
21 the bus station, the experts, the police, we believe that the
22 evidence will establish beyond a reasonable doubt that there
23 were two evil doers in this case.

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1 And, sadly, Donna Roberts, who when you read the
 2 letters and you listen to the tapes, this woman had a pretty
 3 good life. She had the ability to walk out of the
 4 relationship with her significant other. There wasn't a
 5 marriage; there was a divorce. And she had legal title to
 6 cars, legal title to the home, she had everything. But we
 7 will go into when you read and listen to the evidence that
 8 she depended on Robert and she was not in a position to
 9 financially take on the relationship and have the way of life
 10 she had been used to with this guy.

11 MR. CONSOLDANE: Your Honor, I'm going to
 12 object. There's been no evidence of that in this trial.

13 MR. WATKINS: Your Honor.

14 MR. LEWIS: All the evidence is that
 15 she --

16 THE COURT: This is argument. I don't
 17 think that's beyond the scope of his interpretation of the
 18 facts and the matter.

19 MR. LEWIS: Yeah, sure it is.

20 THE COURT: Your objection is noted for
 21 the record. Overruled.

22 MR. WATKINS: Thank you, Your Honor. In
 23 fact, there is a letter that I'm going to read to you, for

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1 example, where she writes him and says that she's having
2 financial problems and that Robert is taking her 32 credit
3 cards away and she doesn't know how she's going to do
4 anything because of the restrictions he's made and that she's
5 used to having money so she can do whatever she wants. And
6 she will trace for you a history of living in Miami and going
7 to Rome and going to Italy, going to Jerusalem and having new
8 cars, which you saw in the evidence and will see in the
9 photographs, you haven't seen them yet but you've heard about
10 them, the two 300M automobiles. And I will spend some time
11 going through the letters and the tapes and the conversations
12 and show how the weave is so clear and so tight of his guilt
13 of every charge in the indictment.

14 Now, there are facts that are for you to decide and
15 certain provisions of law may or may not apply. For example,
16 there will be an instruction on flight where -- and, by the
17 way, I'm skipping ahead, sometimes I do that. In the case
18 when the judge instructs, in this case the defense has an
19 instruction that's been given by the Court of self-defense,
20 and in self-defense the defendant has the burden of proof
21 that by a preponderance of the evidence, that is there's more
22 evidence in favor, that the defendant's life was in danger by
23 action by the victim that he had to use force to kill the

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1 victim.

2 Now, the burden of going forward on self-defense,
3 which is also in the instructions, is one piece of evidence
4 the defense is relying on. The only evidence in this case of
5 self-defense is the video statement that was played for you;
6 self-serving and, we submit, full of holes, contradictions
7 and pure nonsense under the facts and the evidence. But

8 because --

9 for example --
10 MR. CONSOLDANE: Your Honor, I object to
11 him saying it's nonsense. He's the one that admitted the
12 tape. I mean, he can say it's full of holes, but to say it's
13 nonsense is wrong. The Court has already ruled that that
14 videotape is --

15 THE COURT: It is evidence, but it's the
16 comment by the prosecutor of his opinion. The jury is the
17 one that has to determine whatever the validity is of the
18 thing. What Mr. Watkins says is merely something for them to
19 consider, it's not something that they have to take at face
20 value, as they don't have to take anything at face value that
21 the defense says. Overruled. Please proceed.

22 MR. WATKINS: Thank you. And I will go
23 through what in my opinion the evidence will show, that it's
prevarication, prevarication and pure nonsense. Excuse me.

1 Now, in order to explain the evidence I need to
2 start with going through these instructions so I can comment
3 how I'm going to tie my case into what you're going to get in
4 the law. For example, the instruction on self-defense, I'm
5 not going to spend much time on it because I don't think it
6 exists, but because he said that he defended his life and it
7 was taken the instruction is there, but he has to prove that
8 by that tape. And then because there is in the tape -- and
9 it's interesting, the tape, for example, he contradicts
10 himself within one page when you read the transcript. On
11 page 10 of the transcript he goes into Robert's house and is
12 sitting at the table after he went to the bathroom. And then
13 Mr. Monroe asks the question, the same question, he says
14 where were you when you went into the house right before the
15 struggle and the shot? He says, well, Robert was standing by
16 the counter. He just said he was sitting down with Robert
17 and then all of a sudden 30 seconds later he's standing by
18 the counter. Now, that's some of what I'm going to go
19 through, what in my opinion is that the statement is
20 absolutely a falsehood and it's self-serving.

21 Now, in the event that you don't find self-defense
22 then you can go to lesser offenses like murder or
23 manslaughter because they had a fight. That's if you believe

1 the evidence that they're going to present. I'm going to end
2 it there because I don't think it exists in this case.

3 MR. LEWIS: All right. Now, what I do think is important from the State's
4 point of view of the evidence is a recognition of what the
5 law says as to what an owner is. In our daily lives we have
6 families that don't have title to vehicles that may be used
7 by other family members. We have children that may use our
8 car and we have children that come into their house and
9 they'll say that's my home, that's my house. The fact that
10 the child doesn't own the home, doesn't have title, doesn't
11 mean that he isn't a possessor of that home. A home is a
12 place that you dwell. A home is a residence. It's where you
13 live. This is where Mr. Fingerhut lived. This is where his
14 clothes was. This is where he lived and breathed. I don't
15 care who had title.

16 If your child has a car and somebody takes a gun
17 while he gets out of his car and shoots the child and takes
18 the car, is the defense going to be hey, the title is not in
19 the child, it's in --

20 MR. LEWIS: That's not the facts of the
21 case. Judge, I mean, he can say --

22 MR. WATKINS: Your Honor, this is
23 argument.

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1 THE COURT: Well, he's arguing his point.

2 The jury, I think, understands it's argument.

3 MR. LEWIS: All right. As long as the
4 defense is allowed to do that.

5 THE COURT: He's not limited to the
6 stipulation or the facts of the case, Mr. Lewis.

7 MR. LEWIS: The defense is allowed then,
8 we can do the same thing obviously, right?

9 THE COURT: What's that?

10 MR. LEWIS: I say we can do the same thing
11 then, judge?

12 THE COURT: You can do the same thing in
13 the same context, absolutely.

14 MR. LEWIS: Thank you, sir.

15 THE COURT: Overruled.

16 MR. WATKINS: The point is that when you
17 hear the definition of owner it includes someone who has
18 possession. The law also protects people that are in the
19 home. They don't have to have title if they have the right
20 to be in that home, if that's their dwelling. And where
21 someone enters a premises, for example, in this case it's our
22 theory that we believe the last conversation from this man on
23 the 8th of December, "One thing you got to do for me is let

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1 "Come in the house, let me in the home."

2 In that same tape Donna is talking about picking up

3 Nate at prison and she says, "I'm going to leave before he

4 gets home." Nate Jackson went in that home and Donna gave

5 her permission, gave him permission to go in that home. When

6 Judge Stuard instructs you, if you find that he went in that

7 home with the purpose to kill the owner he is a trespasser as

8 as to -- excuse me, as to Mr. Fingerhut who lives there, he is a

9 trespasser as to Mr. Fingerhut when he comes home, which

10 means an aggravated burglary is committed. That is, the wife

11 is not in a position, the owner of the home is not in a

12 position to authorize some other person to come in and kill

13 another resident of the home. It's basic law. And whether

14 or not it is a significant other, a child or a neighbor, it

15 doesn't matter.

16 If you were away and you have your children and one

17 child authorizes another neighbor kid to come in and the

18 neighbor kid starts destroying property and the older sibling

19 says, "You're committing a violent crime to the house, you

20 got to get out," that is a crime against the older child if

21 there's some violence because there is no authorization if a

22 person has a lawful right to be in the home for any other

23 person to commit a violent crime against a person who lives

1 in the home. That is why it is important when listening to
2 the jury instructions that you understand that it really
3 doesn't matter who owned 254 Fonderlac. If you find that
4 Mr. Fingerhut was a resident, he had a right to go into his
5 house and not have somebody there and kill him. And he had
6 the right to drive that car home if he had lawful possession.

7 And, by the way, when Mr. Monroe, it's
8 uncontradicted, went there she said her husband's car was
9 stolen. Her husband's car was stolen. And if it's in his
10 possession and if it's taken with force, that's aggravated
11 robbery. That simple. If you find he had the right to
12 possess the car and that he was using it, if you find that it
13 was his home and he had the right to be there, no person,
14 including the owner of the home, can authorize a third party
15 such as Nate Jackson to go in and commit a crime and ambush
16 that person who had the right to be there. It's common
17 sense. It is the State's concern that there not be confusion.
18 And, in fact, when the judge instructs you about proof beyond
19 a reasonable doubt he will tell you to use common sense.

20 The evidence includes, and I'm going to -- when you
21 see the exhibits of the life insurance policy, Donna Roberts
22 applies as spouse. When you heard from all the witnesses how
23 did they view these two people, they had twin cars. I know,

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1 the last witnesses called him Mr. Roberts. That's evidence
2 of the type of relationship. I know that they're not
3 married, but a lot of people live together and have
4 significant others. And if that relationship is such that it
5 is reasonable to assume that the car is lawfully being used
6 by the other significant other or the guy is living in the
7 house with the woman, he has the right to be there and nobody
8 can authorize somebody else to go into that house and kill
9 him and take his property, including the owner. And I
10 believe when you read the instructions that's what you're
11 going to find the law is and I believe our evidence is going
12 to show exactly what I'm saying to you now, if you believe
13 it, and I think it's numerous and from many different sources
14 that didn't even know each other.

15 Now, this is the 911 tape. Please listen. Please
16 listen to how --

17 MR. CONSOLDANE: Your Honor, I'm going to
18 object to him playing that at this time. That's already been
19 played. For him to -- I think the jury can play it back in
20 the room. They're going to have the recorder. There's no
21 need to play that now.

22 THE COURT: Mr. Watkins.

23 MR. WATKINS: Your Honor, the State is

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1 allowed to play, play its -- every party is allowed to do
2 what they want with its evidence. It's only going to be two
3 or three minutes.

4 THE COURT: Is there an objection that the
5 State has the right to review the evidence with the jury and
6 to take it through logical order?

7 MR. CONSOLDANE: Well, I just think he's
8 already played it once and they can play it back in the jury
9 the tape room. I can't see why he's doing it now.

10 THE COURT: Well, I understand, but I
11 think it's proper if Mr. Watkins wishes to --

12 MR. WATKINS: Your Honor, may I be allowed
13 to continue, please?

14 THE COURT: I'm sorry?

15 MR. WATKINS: Am I going to be allowed to
16 continue?

17 THE COURT: Please. Overruled.

18 (Whereupon, State's Exhibit No. 1 (911
19 tape) was played to the jury.)

20 MR. WATKINS: Husband.

21 (Whereupon, State's Exhibit No. 1 (911
22 tape) continued to be played to its conclusion.)

23 MR. CONSOLDANE: Your Honor, I just want

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1 to note for the record that while the tape was playing
2 Mr. Watkins said "husband" and made a gesture to the jury.

3 That was improper. He can say after the tape was over or
4 they can listen to what the tape says, but for him to tell
5 them what the tape says while it's going on is improper.

6 THE COURT: I didn't hear any -- I didn't
7 catch that, but anything that was said, disregard it, by
8 Mr. Watkins, while the tape was being played. You were
9 listening to the tape. Please proceed.

10 MR. WATKINS: Thank you, Your Honor. "My
11 husband." Play it later on and you can play it in the room,
12 it says, "Oh, my husband."

13 There will be letters that you will read from Donna
14 Roberts to this guy saying one of the hardest things for her
15 to do in this case is to make it sound like I'm sorry he's
16 dead. "I don't know if I can fake it," and she writes when
17 they go through the letters dealing with "the problem is
18 going to be for me to put on a show." That will be in
19 letters that you have. She didn't know if she could be an
20 actress.

21 Now, I think I've gone through the importance of
22 jury instructions, definition of trespasser and owner, and
23 the different charges that you are going to get because of,

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1 for example, the self-defense because of the tape we played.

2 And, again, the burden of proof is on them. I would like to

3 cover the other side at this time.

4 We promised that we were going to show a number of
5 things in my opening statement, and they have it, they can go
6 through it. I think I've presented that evidence with
7 Mr. Morrow. There might be a few little things that might be
8 off that's not perfect or not going to conform but we
9 presented evidence that went in line with what we promised in
10 our opening statement.

11 The other side that was given in the opening
12 statement by the defendant, it was stated that the defense
13 would prove or show by the evidence that Nate worked at the
14 bus station, both the one in Youngstown and the one in
15 Warren, and that he helped out a lot of times just unloading
16 luggage but he also worked behind the counter. Not true.
17 Jose Sanchez, you know Nate Jackson? He worked there? No.
18 James Daniels who's been there for years, he doesn't work
19 there. Frank Reynolds, not that long. Has he worked there?
20 No. Jimmy McCoy when he came to Warren; now, it's true that
21 he was with Donna. Jimmy McCoy is a bus driver for 16 years,
22 he goes to Warren all the time. He couldn't even identify
23 Nate Jackson. He knew him as Nate and that was given on the

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1 day, December 11th, when he met him as Nate. There is no
 2 evidence that this man worked at the bus station.
 3 and Chris Ellington worked next, at the hair shop next
 4 to the -- he said the first time -- and remember Chris
 5 Ellington? She identified what Donna looked like, she talked
 6 about the two cars. She had a hair shop, a beauty shop right
 7 next to the bus station. Nate came in on December 11th, got
 8 a hair cut. First time she knew him. No proof.
 9 Now, it's true if you believe Nate when -- and I'll
 10 get to -- when he gives his statement on December 21st that,
 11 you know, Mr. Fingerhut worked all day and that you saw him
 12 leaving with the bag at 9:00 o'clock. Nate says that
 13 Mr. Fingerhut, when he went to visit him, and I'll get into
 14 the time factor which makes no sense, at 5:00 o'clock. We
 15 have witnesses he's in Warren at 5:00 o'clock. I guess when
 16 you hit 50 sometimes your thoughts, you know, just go. Geez,
 17 I had an important thing and forgot, but I'll get there.
 18 Anyways, yeah, Mr. Fingerhut, what I was getting to
 19 when I got distracted dealing with the time factor, which
 20 I'll get to, here is Mr. Fingerhut in dealing with the tape,
 21 the tape that you're going to see and if you play it and
 22 read, the one you saw, play it, the defendant's version was
 23 that this man who worked all day who was walking out with his

1 bag that you see the picture at 9:01, that Fingerhut is going
2 to pick him up to go get the marijuana and then ultimately he
3 was going to give him a job, and I'll get into that
4 specifically. In fact, let's go there. I'll come to that
5 shortly. So Nate worked at the bus station, both the one in
6 Youngstown and one in Warren, helped out a lot unloading
7 luggage; defense. No.

8 After the Wagon Wheel, the next day Donna dropped
9 him off at his family's house with the understanding he was
10 going to get a job down at the bus station. The job at the
11 bus station again is in Nate's statement, which you will
12 read. The defense then goes on and says on Tuesday, December
13 11th, around 5:00 o'clock, Nate went to the bus station to
14 talk to Bob Fingerhut as to the job and Fingerhut had told
15 him that he could probably work in the Warren office, which
16 was fine with Nate because he would be more there with Donna.

17 Now, first, Nate in his statement said he was
18 dropped off at Youngstown at 7:00 o'clock on December 12th,
19 and around 5:00 o'clock, Attorney Consoldane said to you that
20 he was going to show by the evidence, that Nate was in
21 Youngstown and went where the luggage was at and that's where
22 he talked to Fingerhut about hey, after work come up to
23 C. Staples because we're going to go to Warren. And first

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1 they went to get marijuana, according to the defendant. No
2 marijuana in his system. And when he was questioned on the
3 fact, tape where was the marijuana, it's apparent that Nate had no
4 explanation because there wasn't any marijuana. He never
5 picked up Mr. Fingerhut.

6 Jimmy McCoy testified 5:15 is the time he was there.
7 He's on a regular route from Youngstown to Warren so he's not
8 5:00 o'clock in Warren, in Youngstown, because he's 5:00
9 o'clock in Warren, according to the State's evidence, if you
10 believe him.

11 You have Chris Ellington. Where is he at on
12 December 12th? He's in Warren with Donna. So we have two
13 witnesses in the afternoon, it was sometime during the day;
14 Chris Ellington, we got Nate and Donna. At 5:00 o'clock Nate
15 and Donna. They're maintaining that Nate at 5:00 o'clock is
16 in Youngstown talking to Robert about hey, let's go out, I
17 want to work.

18 Where else do we have him? We had a young lady come
19 in from Red Lobster. So after he leaves the Youngstown
20 office with Donna he goes to the Red Lobster. We have
21 witnesses that account for the presence of the defendant in
22 Warren, Ohio with Donna Roberts from the afternoon, the 5:00
23 o'clock, to 6:00 to 7:00 at the Red Lobster if you believe

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1 our evidence. So the opening comment, he's in Youngstown
2 meeting Robert at 5:00, not true if you believe our evidence.

3 In fact, Jill Kenyon testified there were receipts
4 and she positively identified the parties, Donna and -- Nate
5 she identified. Excuse me. 5:54 she puts the drinks in;
6 6:43 the bill. Not in Youngstown. Nate and Donna are
7 together as they were at the Wagon Wheel the night before
8 preparing to kill the victim.

9 MR. LEWIS: That was two nights before I
10 guess.

11 THE COURT: I'm sorry?

12 MR. LEWIS: The Wagon Wheel was Sunday
13 night, wasn't it?

14 MR. WATKINS: Yes, it was Sunday night.

15 MR. LEWIS: Okay.

16 MR. WATKINS: And into Monday. It was
17 into Monday.

18 MR. LEWIS: Whatever.

19 THE COURT: Is there an objection?

20 MR. LEWIS: Well, the evidence, he
21 misquoted the evidence.

22 MR. WATKINS: I didn't. They were in that
23 motel under the evidence until Monday morning somewhere

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1 between 11:00 and 12:00 o'clock.

2 THE COURT: Yeah. As far as what they

3 were doing in the motel, the evidence --

4 MR. LEWIS: Okay. That's -- I apologize.

5 THE COURT: -- doesn't necessarily

6 support. That would be a conclusion.

7 MR. LEWIS: I apologize. Go ahead. Go

8 ahead. Go ahead.

9 MR. WATKINS: Now, Attorney Consoldane

10 goes on and says, he told the jury he's going to show you

11 that Nate wanted -- excuse me, that Robert -- I'm quoting,

12 this is transcript I'm quoting-- wanted to take Nate, that

13 Robert wanted to take Nate to the Warren office and show him

14 how the computer was run. 9:00 o'clock the guy is getting

15 off and, according to defense counsel, that Robert wants --

16 he picked Nate up at C. Staples, was going to take him to

17 Warren at 9:00 o'clock at night after working all day and

18 show him how to run a computer? That's opening statement.

19 No evidence of that. Zero. Not even the defendant in his

20 own statement given to police says that he was going to go

21 work on the computer at night.

22 What else are you told? Robert picked him up

23 somewhere around 9:00 o'clock. Well, one of the pretenses is

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1 that they were going to the Warren bus terminal but he said
2 he had to stop off at home first. Okay. Defense counsel
3 version of the events is he's going, he's going to go from
4 C. Staples to home, which is a little different than, well,
5 we're going to go to the computer but they stopped off at
6 home. Forgot one thing. The defendant's own statement was
7 that at 9:00 o'clock he picks him up and then they go out and
8 get drugs. Well, we know from the time factors of using the
9 phone of 9:45 that there was no drug purchase, so that was
10 left out. That is, the defense version of the evidence does
11 not include what the defendant is telling through his video,
12 that they went and got drugs, he and Robert. And you can
13 listen to it.

14 Then there is a summary that there was an argument.
15 "He got out of the car and went into the house and he came
16 out shortly. There was an argument between Nate and Robert
17 Fingerhut." That's the defense version in opening statement.
18 "Fingerhut pulled out a gun and there was a struggle. Nate
19 grabbed the gun, the gun went off, injured his finger. Nate
20 is left-handed, he wouldn't be holding a gun in his right
21 hand." There is no evidence of that. You can shoot a gun in
22 either hand. "And, you know, we don't have the gun so we
23 really don't know how many shots were fired." That's not

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1 true. We know how many shots were fired.

2 MR. CONSOLDANE: You know, I'm going to

3 object. The crime scene was disturbed before we ever got to

4 see it. They alleged there was -- they found the three

5 shots.

6 THE COURT: Mr. Consoldane, that's

7 something that you have a right to raise in argument. The

8 State has the right to present their theory of the case and

9 it sounds to me like that's what he's attempting to do.

10 MR. CONSOLDANE: Well, but he's saying

11 that I said something that's not true and it's my theory.

12 MR. WATKINS: Well, I'm saying it's not

13 true, his theory is not true.

14 MR. LEWIS: All right, Dennis. Go ahead.

15 THE COURT: Overruled. Let's proceed.

16 MR. LEWIS: Go ahead.

17 MR. WATKINS: We know how many shots,

18 ladies and gentlemen, because the police and the coroner

19 testified that we have the victim shot three times and that

20 there was only -- there was two bullets recovered, one in the

21 brain of the victim, the other went through the victim's

22 right from the back and was recovered in his clothing, and

23 the other bullet was in the wall or the plastered area or the

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1 drywall area of the stairwell leading to the basement. They
2 testified there were no other bullet holes. And when the
3 defendant says he shot down, there were no -- which is
4 contrary to the defendant's statement -- there was no bullet
5 holes in the floor. There were no other bullet holes. So we
6 do know there were three shots fired as far as we are
7 concerned from the evidence.

8 Now, Fingerhut, according to defense version,
9 Fingerhut then ran into the house and grabbed another gun.
10 Oh, wait a minute. Defense counsel said that their evidence
11 is going to prove that Fingerhut went in the house and got
12 another gun and that the shooting was outside the house.
13 Please listen to the defendant's own version. The defendant
14 unequivocally says there was only one gun, there was one
15 struggle and it was in the house. There has been no other
16 evidence that Fingerhut ran into the house and grabbed
17 another gun.

18 "And he started pointing it at Nate and that's when
19 Nate, who now had Fingerhut's gun, shot him back a couple of
20 times." "Shot him back" should be "shot him in the back" two
21 times. One, the second gun, the defense version is that the
22 gun is taken from the victim after he shot the finger, that
23 is the defendant shot the finger. Fingerhut goes and gets

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1 another gun. What, is he just standing there? And then it
2 said that, that he had Fingerhut's gun. Okay. That is that
3 from all (3) the defendant, Nate, now had Fingerhut's gun. Not true.
4 You have the registration of the two guns. And, in
5 fact, Donna Roberts, they even conversed about the fact there
6 were two guns in the house after the one gun is reported
7 missing. The gun that was found is a Taurus and a Taurus has
8 three, five -- it twists to the right five twists. And this
9 gun, the gun that was found on the floor, it didn't have any
10 blood. It wasn't seen by the defendant in his statement. It
11 belongs to Robert Fingerhut. Unshot gun. Unshot gun.
12 Robert Fingerhut's gun was on the floor unshot, unused.
13 The missing gun, twin guns, and you heard
14 ballistics, the bullets that killed the victim could have
15 come from a Taurus, the missing gun. Donna Roberts. He had
16 Donna Roberts' gun. That's the murder weapon. So we got him
17 shot differently, we've got the players in different
18 positions, the defense version, which there's not been any
19 evidence additional to what his statement was that you saw.
20 They contradict each other.
21 Nate went and looked at Robert Fingerhut. So he
22 shot him -- Fingerhut has got another gun and he's coming at
23 him and as he's coming at him he's turning like this and he's

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1 shot in the back and doesn't shoot Nate. Nate's not shot. I

2 mean, here's -- I mean, what a miraculous situation here.

3 Unbelievable from all the evidence.

4 He was scared, according to defense, and he got in

5 the car and drove back to Youngstown and he called Donna.

6 And he's telling you on the tape several times Donna, he

7 doesn't know if Donna knew that he shot the victim. That is

8 Nate doesn't know that. Do you believe that? I believe from

9 the evidence it's not believable. That's my opinion.

10 Ridiculous. He's calling Donna with Donna's cell phone, and

11 you got the phone records, at a quarter to 10:00, five or six

12 times, and then Donna checks him in at the Days Inn.

13 And is he scared? You heard the evidence. What is

14 he doing? This guy is scared? I don't think this guy is

15 scared. He's getting Mr. Stamper to take him -- to take two

16 women to visit him and have a good time. According to

17 Stamper he was calm. Injured his finger. Other than that,

18 he's calm. He just murdered someone.

19 And he abandons the car in Youngstown and the car

20 has blood. You'll see the pictures. He's dropping blood

21 when he left that house into the garage and into the car.

22 That's how we figured it out, or how the police figured it

23 out as part of the evidence. And we have the DNA, even the

1 mixture of this guy's DNA with the victim. Who is using that
2 car? Whose personal property is in that car? Whose keys?
3 They say that's not his car? Come on.

4 Tony Consoldane said shot in the back a couple of
5 times. The man, he was shot three times. Uncontradicted.

6 The defendant in his video statement, he can't remember,

7 doesn't know where he shot him. Yeah, right in the top of

8 the head. And you have this confrontation. Ladies and

9 gentlemen, the uncontradicted evidence is the victim, when

10 you have the blood all down here in this area, and you'll see

11 the pictures, splatters, and you see his webbing of his left

12 hand blown out and you got a bullet hole down here, goes

13 straight down his head. And guess what? There's soot in the

14 epidermis and dermis of the brain, the skin over the brain,

15 and here within 24 inches. Like this is two guys going at it

16 in the old west. I don't think so. Malarky.

17 Continuing the defense version, Robert Fingerhut

18 beat Donna Roberts, beat her up about a week before this

19 happened. Santiago told Fingerhut about the affair. It's

20 important in the State's view of the evidence to recognize

21 you got 280 letters, there's a lot of things said from early

22 -- some of the few letters come from early 2002 and then many

23 letters, Donna Roberts writes multiple, up to five letters a

1 day. And we don't have all of them because you're going to
2 read in some of them that destroy those letters. In fact,
3 that was one of the biggest mistakes ever made is to preserve
4 letters and along with the tapes. Seldom does the jury have
5 the quality and quantity of evidence in a case that you can
6 hear the words and see the writing of the plan to kill.
7 Seldom does the jury get so much evidence. But the diversion
8 here, and it's truly a diversion in my opinion --

9 MR. CONSOLDANE: Did he say diversion?

10 MR. WATKINS: Diversion.

11 MR. CONSOLDANE: That I'm creating a
12 diversion?

13 MR. WATKINS: Absolutely.

14 MR. CONSOLDANE: I object to that, Your
15 Honor.

16 THE COURT: Okay. Just a minute. Just a
17 minute.

18 MR. WATKINS: That's what I believe the
19 evidence is, Your Honor.

20 MR. LEWIS: He's fair game too, judge.

21 THE COURT: Just a minute. Just a minute.
22 Ladies and gentlemen, please disregard this little exchange.
23 It's not part of this case. Please approach the bench.

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1 (Whereupon, a bench conference was held.)

2 THE COURT: Ladies and gentlemen, let's

3 take a 10-minute break. You're not to discuss anything or
4 form any opinions.

5 (Whereupon, a brief recess was taken by
6 the jury during which the following proceedings occurred in
7 chambers outside their presence.)

8 THE COURT: Okay. We are on the record in
9 chambers out of the presence of the jury. Defendant's
10 presence waived?

11 MR. CONSOLDANE: Yes, Your Honor.

12 THE COURT: Listen, although the defense
13 is usually the one personalizing the prosecution as being the
14 ogres, the objection here is made by the defense that or you
15 have taken umbrage with the fact that the prosecutor perhaps
16 is giving a little bit of tit or tat again. I don't think
17 it's proper in either case. I think that the State has the
18 right to review what was said on opening and to point out his
19 opinion of whether or not those statements were upheld by way
20 of the evidence presented. The one word that they did use
21 was deception.

22 MR. WATKINS: No. I used diversion.

23 THE COURT: Oh, diversion.

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1 MR. WATKINS: Of the affair, and I was
2 trying to go into simply that the affair --

3 THE COURT: Admonition. Whatever.
4 Whatever. You were saying you used the word --

5 MR. WATKINS: Diversion to the point of an
6 affair. Was going to go in and explain this was a diversion.

7 THE COURT: Do you think that is improper
8 comment?

9 MR. CONSOLDANE: I thought he said
10 deception.

11 MR. LEWIS: No. What he said was, judge,
12 that the defense is creating a diversion and he says creating
13 and so it sounds like we're doing the trickery, we are
14 falsifying something, we are defrauding the Court. That's
15 what it implies. And --

16 THE COURT: Well, the advocacy is
17 probably there, but I think it is proper comment because
18 that's what he does, do you not, on behalf of the defense
19 often times? Probably in this case it may come up, say, the
20 State is misrepresenting the facts here, the State is.

21 MR. LEWIS: I never say that. I really
22 truly don't. I use the facts the State presents. That's the
23 only witnesses they believe in the first place so I have to

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1 use their facts supposedly.

2 THE COURT: Well, as far as this.

3 MR. LEWIS: Okay, judge.

4 THE COURT: I'm telling both sides that

5 you cannot transfer your argument to the point of where you

6 are attacking opposing counsel for the way -- to give

7 sinister motives or objectives for the way they have

8 presented the case. The case is the defense, the defense is

9 the defendant. You are merely the operators for his defense.

10 The State is the State and the prosecution is merely the

11 representative of the State. There is no need to use any

12 adjectives or anything that personalizes either the opposite

13 side as to wrongdoing unless there has really been some

14 objective wrongdoing. Okay?

15 MR. LEWIS: Well, at this point in the

16 game, okay, he's already said to the jury fine, we've created

17 a diversion. If that's fair game then fine, I will be glad

18 to say that. He's also said it is malarky, all this other

19 stuff, and nonsense. Well, whatever he says it's equal law,

20 I can use it, and if that's okay with the Court and he's

21 allowed to do it then I am going to be more than pleased to

22 go do it.

23 MR. WATKINS: I think Jim can say it's

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1 malarky if he quotes the evidence, which I'm quoting the
2 evidence, a statement. I think that's fair game. There's
3 nothing wrong with that, and you've done it.

4 THE COURT: James, I've heard defense
5 counsel say a hundred thousand times, say the State is trying
6 to mislead this jury.

7 MR. CONSOLDANE: I never said that.

8 THE COURT: Maybe not using the word
9 misleading but that is the implication, and what you are
10 objecting to is the implication.

11 MR. LEWIS: We don't say that, judge. We
12 are a little smarter than that. But that's all right, I
13 understand what you're telling me, but I'm just saying there
14 shouldn't be anything. The nonsense, the malarky, that's
15 okay, but there shouldn't be any implication of fact that the
16 defense is somehow lying or creating or deceiving or in that
17 sense of the word. That is absolutely prohibited commentary
18 and it's just -- it, it shouldn't be allowed.

19 MR. WATKINS: I'm saying there is a
20 diversion. It is not relevant to the case. I was going to
21 get into why lawyers do that all the time.

22 THE COURT: Well, I just had the feeling
23 throughout this case that -- well, strike that. Let's go

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1 forward.

2 (Whereupon, the proceedings in chambers
3 were concluded and a brief recess was taken, after which the
4 proceedings commenced in open court.)

5 THE COURT: Please keep your seats. Okay.
6 Mr. Watkins, you may continue.

7 MR. WATKINS: I may proceed, Your Honor?

8 THE COURT: (Nods head affirmatively.)

9 MR. WATKINS: Thank you. As I was saying,
10 this is my opinion, that there was -- that it's really not
11 relevant and it's a diversion from what I think what's
12 important. I'm not aspiring anything to Mr. Consoldane
13 personally, it's not a personal thing. I'm doing my job, or
14 trying to.

15 And to go through it again, that it was the defense
16 position in their opening statement and they said that Robert
17 Fingerhut beat Donna Roberts, beat her up about a week before
18 this happened. Santiago told Fingerhut about the affair.

19 You're going to see in letters, end of November,
20 that -- and there is -- the deceased is not here but there is
21 evidence that would go together here that he knew something
22 was wrong and in a lot of what Donna describes about her
23 relationship with the husband and how she couldn't stand him.

1 There's comments like on his birthday, it was in October, the
2 only thing that she wished for his birthday was his death.
3 But then you're going to see a lot of other things about how
4 she's dependent on him working, getting money for her, and
5 the discovery of, which was a call to Mr. Fingerhut, that
6 your wife -- strike "wife". I'm sorry I used that term.
7 Donna was having an affair with a black guy.

8 And she says in her letter that Robert and her got
9 into a tussle, a fight, and I'm going to read, and this is
10 two weeks before the killing and you will have this, but it
11 is the November 28th letter. And I'm going to read part of
12 it and I don't, I truly believe if you read everything it's
13 going to -- I'm not trying to make something look like it's
14 not. You're going to have the ability to read it all. I
15 don't know if you can read it all, there's so much to read,
16 but whatever you read is going to be up to you, but I'm going
17 to try to give you guidance as to the way the State views its
18 evidence.

19 First, she had charged somebody for stealing a gun.
20 On the tape you heard about one of the guns was missing.
21 Well, she ended up charging this man for stealing the gun and
22 there's some conversation for a few days about her safety and
23 no, you better go charge the guy, the gun is taken, and

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1 that's when, "Well, you have two left." And this man,
2 apparently from what she is stating, informed Robert because
3 he's mad and he was charged.

4 And Donna is writing the defendant, "We really got
5 into it last night. Proud to say I got in two good punches.
6 But I did sustain a dog bite to my right leg - Fluffy went
7 nuts when we were fighting." And then, "Also I hope all my
8 black and blue marks are gone by 12/9." Now, that's the kind
9 of thing that you have in some of these letters painting this
10 guy in the light that she does, and it goes on to something
11 else.

12 It's obvious -- I got two good punches in and then
13 the next day she writes a letter and the riot act is given to
14 the defendant. Now, after his bad deed the next day, she
15 discovers in one of his shoes or one of his bags the numbers
16 to five different women, and you will read every name in the
17 book, that her whole mind the next day is on how can Nate
18 have all these girlfriends? You lied to me, you lied to me
19 again. I can't trust you, I can't trust you. So then you
20 can read a couple days of these kinds of letters. And she
21 even threatens him, she's going to terminate her
22 relationship, but then when you get into November, this is
23 two weeks before, they're all back on track with the same

1 plan that's been existing.

2 And, in fact, interestingly, and I will -- and
3 again, this is November 28th, 12:30 p.m. When she writes
4 Nate she puts the time and says "10 days." She got beat up,
5 this is Mr. Consoldane talking about that Fingerhut beat her
6 up about a week before, really two weeks, and so I just went
7 into what the conversation is about how she's beat up.

8 The next day, the 29th, the 29th, the next day after
9 this, first paragraph, "Why do I love you so much? Huh? I
10 do honey. So anyway, I went to AAA and got a map to Grafton
11 and the institution is right on there. I also went to four
12 stores and finally found your ski mask and boxers and a pair
13 of beautiful fleeced lined black ... gloves." Fleece lined
14 black gloves. You'll find it and you'll find them in the
15 exhibits, black fleece gloves. And you will also find in the
16 letters and on the tapes how he needed gloves, handcuffs and
17 a ski mask.

18 The defense presented next in their opening
19 statement, "There is plenty of evidence to show that he had
20 no interest at all in that house." He had no interest at all
21 in that house. That's where he lived, that's where he has
22 clothes, that's where he's going home to. You will determine
23 whether or not he had an interest or he had a right to be in

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1 the house and he was killed in the course of an aggravated
2 burglary. We believe all the evidence shows that he had an
3 interest in that house. He was in a relationship where he
4 had absolute access and control of that house, and there's no
5 evidence you're going to find at the time of this homicide he
6 was out of that house at all. And we're dealing with
7 December 11th. Not two weeks before, not five weeks before,
8 we're dealing with December 11th.
9 And the best proof that he was in that house
10 properly is Donna Roberts right there, that's how you know.
11 And you also can take Nate's statement when Nate in his own
12 statement says he's looking at the mail. You can believe
13 part of his statement. That is sort of corroborated by the
14 physical evidence. When the man was shot there was mail in
15 that vicinity.
16 Then it is presented, "We know that Fingerhut had
17 plenty of reason to be upset with Nate. The letters that
18 Nate wrote were found in the bedroom in the Fingerhut house.
19 Very likely that Fingerhut could have read these letters, and
20 especially the letter that indicated that they wanted to move
21 Nate into the house." If Mr. Fingerhut read those letters is
22 there any way in this world that Mr. Fingerhut would be
23 driving Robert from Youngstown to get some drugs and coming

1 to the house and going to show him how to use a computer or
2 going there? This man did not know what was coming.
3 Incredibly as it seems, we believe the evidence shows that he
4 did not know the plans that you will see in the letters and
5 you will hear on the tapes.

6 And I want to go through the letters in part that
7 I'm talking about, the letters that if he would have seen,
8 that is Mr. Fingerhut, would have been out of the house and
9 Mr. Fingerhut would be nowhere around this man if he would
10 have read those letters. In fact, you will read letters
11 where she says he came in, I couldn't write you a letter that
12 afternoon because he came in. You got to read all of it to
13 really understand, or at least a lot of it.

14 Nate to Donna letters, approximately 141 letters.
15 3/19/01, "I'm really in love with you, ... I want you all to
16 myself... I'm willing to go through any extreme to make that
17 happen." March 19th, '01.

18 Nate to Donna letter on April 28th, '01, "... like I
19 said baby it won't be long an I promise we will live happy
20 with out him an I promise you that from my heart, baby I
21 can't stand him! Thats right!!" You listen to the tape.
22 The defendant says Mr. Fingerhut was a cool guy, got along
23 with him, he's an all right guy.

1 May 9th, '01 Donna gets a letter from Nate. This is
2 in part because these letters are five, six pages long. And
3 when you read these letters, some of it has so much vulgarity
4 that it's beyond belief and I'm not going to read much of
5 that. "Donna baby i've just read your letter an when he said
6 that he think that yo'll should seperate, an the first thing
7 that came to my mind was can i do what i wanna do, or what do
8 you want me to do? because what i wanna do to him is gonna
9 leave you with everything, so what you think?" May 9th, '01.

10 September 27th, '01 Nate writes, "... I've always
11 said can't nobody keep me away from you I mean nobody an
12 Donna when I come home I comeing straight for you an Robert
13 or nobody else cant stop me, because I be damn if you think
14 that you're gonna make love to me an then just leave me.
15 Hell no!!"

16 October 2nd, '01, "... let me do what I was gonna do
17 to him, ... Its getting done when I come home." October
18 2nd, '01.

19 October 8th, '01, "Donna I got it already planned
20 out on how we are gonna take care of the Robert situation?
21 An baby its the best plan ever!" "... I promise on my
22 kids..." Nate.

23 10/10/01, letter by Nate, "An Donna I'm ready to

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1 take you away from all of the pain that you are suffering at
2 home with that asshole ..."

3 10/12/01, I know, I know -- "... I now have
4 something in my life that i never had, an thats God!"

5 "... he has forgiven me an gave me another chance so why
6 can't you?"

7 Right after that, 10/14/01, "... put the gun to that
8 dummys head..." referring to Robert.

9 10/23/01, "... Robert has to go this time for sure
10 an no stopping me!" "... first Christmas together..."

11 10/20/01. Should be read before the 10/23.

12 10/20/01, "... but Robert has to go!" "... Im not gonna let
13 you stop me this time." "... I'm not gonna be happy until
14 that happens!"

15 10/24/01, October 24th, "... I promise ... I'll take
16 care of it the next night, I get out Sunday the 9th an
17 Monday the 10th I promise to take care of it so ... we can be
18 happy like we suppose to be ..." "... be together for ...
19 Christmas ... our ... house ... our big bed." "... an baby I
20 have it planned ... so sweet, to where won't knowbody know
21 nothing but me an you, ... I'll give you the full detail."

22 In that letter, the 10/24, he also mentions these
23 black leather gloves, she finally gets them at the end of

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1 November.

2 On the 25th of October, "... you know ... I think
3 about taking care of that situation everytime I lay down ...
4 you're not gonna stop me ... my mind is made up ..."

5 10/26/01, and by the way, the exhibits, I believe
6 they are 275, the letters that were done by Mr. Greene that
7 were analyzed, "... he will no longer be with us after
8 12-10-01." In that letter, and then he has a tombstone in
9 the October 26th of 2001 letter, that is Nate drew a
10 tombstone, "Rest in piss." Mr. Fingerhut is reading these
11 letters?

12 10/29/2001, "... you will get me a 2002 Cadillac
13 Deville?" "An even if I gotta come to the house an shoot
14 Robert in his f-ing head you're gonna be with me. An do you
15 know what mandatory means?" "... I want you to marry me."
16 "Will you marry me after I take care of things?" October
17 29th.
18 October 30th, again another solicitation by Nate to
19 get the equipment to kill so he's not going to be discovered.
20 "... get me a size large leather gloves an see if you can
21 find me a ski mask..." "An I need them handcuffs you have
22 an its mandatory, ..." If you can recall the evidence,
23 you'll see a photograph in Donna's car, there's a box of

1 handcuffs that's empty, the handcuffs in her car, a box that
2 originally had handcuffs.

3 And that goes along with one of the tapes where
4 Donna was confused, this trunk business, the handcuffs. It's
5 what I said in opening statement. And as he closed in that
6 last taped conversation of 12/8, I'm not going to do it in
7 the house, I'm going to take him and do it somewhere else so
8 there wouldn't be any discovery in the house. The victim
9 didn't go.

10 10/30/2001, that's get the large size leather gloves
11 I just read. 11/6, I'll live with my mom until it cools
12 down.

13 11/7, now this goes in line with the videotape --
14 not the video, the audiotape. "I want our package to watch
15 you ..." perform oral sex "... before it get delivered what
16 you think?" "An I hope your answer be yes, because you know
17 that I'll have it to where it can't do anything but sit there
18 an watch before I take it out an put it in the trunk an take
19 it to where I'm gonna take care of it at an dispose." Nate
20 Jackson, 11/7/01.

21 11/14, "... delivering that package the next day ...
22 show you ... how much I love you ..."

23 11/23, "please let me go ahead ..." "... nobody

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1 know I'm coming ... on the 9th ... " ... know prints ..."

2 Donna, you are "... to negative especially with all of that

3 DNA shit ...". And there's more.

4 11/27, another letter. Donna -- he's pressuring

5 Donna, and I'm paraphrasing. Get the 11/27/01 letter about

6 he wants to do this, and he says, "... I seen chumps like him

7 get bumped off alot throught my life an aint nothing never

8 happened ...". Nate Jackson.

9 Then the defense goes and says in opening statement

10 that the evidence is going to show if we have a conspiracy to

11 kill Robert Fingerhut who benefits? Donna. She's the

12 beneficiary of the insurance policy. "She doesn't get

13 anything else because she has everything else." Well, we

14 know we got the mortgages on all the property so everything

15 else is not as much. But I want to read concerning this

16 issue Nate letters. There's just a couple here and I think

17 they're important. I hope you can bear with me.

18 I read this already but the letter on 5/9 is the

19 letter that "... i wanna do to him ..." what "... is gonna

20 leave you with everything ..." Now, when you go to the 11/5,

21 and we know everything includes, in my opinion, the

22 insurance, Jackson here, the defendant, on 11/5 writes,

23 "... please do whatever you can to keep him around until I

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1 come home okay?" This man is paying that insurance and it's
2 paid up, as we know, \$158 a month. The man knows what's
3 happening. He walks out of the house, the insurance could be
4 changed at any time. He wants him kept around. Why?

5 11/5, now Donna -- right after that, November 9th,
6 there is a number of things in the November 9th letter, but
7 the part I want to read to you dealing with this sentence, "I
8 found out --" this is Donna to Nate, "I found out that those
9 things with the zeros are paid up to the end of the year as
10 per our accountant's suggestion. Yes. I didn't want you to
11 worry about that."

12 10 -- October 20th there's two letters, 11:05 a.m.
13 and 1:00 p.m., Donna to Nate: "Last night he said he wished
14 he was dead. He said all he does is work and sleep and pay
15 bills and has no one who loves him ..." "That is one wish I
16 hope comes true for him." "I hate his face, hair, ... eyes,
17 body - everything about him makes me nauseous." 11:00
18 o'clock.

19 At 1:00 p.m. she writes, "And I haven't been allowed
20 to use any of my 52 charge cards -- emergency only. I am not
21 used to living like this. I am used to loving plenty of cash
22 for whatever I want and buying everything I want. Maybe
23 those days will return again soon." 550,000. "Do whatever

1 you want to him ASAP. Amen."

2 In its close the defense says that the evidence will
3 show that the conspiracy, and this is page 45, "If we have a
4 conspiracy to kill Robert Fingerhut, who benefits? Donna.
5 She's the beneficiary of his insurance policies. She doesn't
6 get anything else because she already has everything else."

7 "Fingerhut, you know, how can he benefit by some
8 type of conspiracy?" The suggestion here is that Fingerhut
9 is going after Nate. "He could always argue to police that
10 Nate came to do something to him and he shot him right there
11 in the house." He didn't argue that. "That gets rid of Nate
12 and, well, that gets rid of Donna. It gets rid of both of
13 them and leaves him with the house and the business." That's
14 not true. How much time have we spent on that? The house
15 wasn't in his title, the business wasn't in his title.

16 Ladies and gentlemen, we have, in my opinion, weaved
17 a factual pattern here that comes from all angles and covers
18 every base and shows that this police department that handled
19 the case and the pathologist and everybody else did their
20 jobs. And we submit after considering that evidence that you
21 will find beyond a reasonable doubt that he is enshrouded
22 with guilt from the evidence. It covers him and it will
23 always cover him because it's true. He committed each and

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1 every one of the offenses in the indictment. Thank you very
2 much.

3 THE COURT: Thank you, Mr. Watkins. Will
4 you gentlemen approach for a minute, please?

5 (Whereupon, a bench conference was held.)

6 THE COURT: This side bar was merely
7 scheduling, nothing of substance. Is that correct,

8 gentlemen?

9 MR. CONSOLDANE: That's correct, Your
10 Honor.

11 MR. WATKINS: Yes.

12 THE COURT: Anyone on the jury need a
13 break right now or can you go until we're going to break at
14 noon? Anyone need a break right now? Okay. I should ask,
15 anybody hold your hand up if you want a break. Okay.

16 Mr. Lewis.

17 FINAL ARGUMENT ON BEHALF OF THE DEFENDANT

18 MR. LEWIS: Thank you, judge. Probably
19 going to need a lot of liquid, ladies and gentlemen. I'm
20 taking Ibuprofen. I got tendonitis but it's working pretty
21 good. They told me to be careful with it because they said
22 the studies now on what was so safe before may not be so safe
23 now.

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1 I didn't get an opportunity in the early, in the
2 beginning to really introduce myself. Mr. Consoldane and
3 Mr. Watkins had an opportunity to do that. And, of course,
4 you know my name is Jim Lewis and I worked with the
5 prosecutor's office for approximately 15 years back in the
6 '70s and '80s and I since became the director of the Public
7 Defender's office and I've been there ever since.

8 I take pride in the fact that during the years as a
9 prosecutor, okay, I, I, I tried one of the only triple murder
10 cases in the county in the number of years that I've been
11 practicing. But, you know, there's something else I was more
12 proud of and I take a lot of pride in is that our office
13 ended up indicting somebody for murder, and I didn't seek the
14 indictment, I didn't have it, but the case was assigned to me
15 within moments of the time I had to go to court. And I'll
16 never forget that because after I started looking at the case
17 and everything else I determined in my own mind that I had a
18 lot of doubt about this case whatsoever and I went about and
19 proved the man innocent, okay, so I take my job, my job very
20 seriously, okay. And in our, in our great mechanized world
21 we just don't think mistakes can be made or this and that,
22 whatever.

23 Our lives depend on mechanics. Our lives depend on

1 a lot of things. And it's tough in a jury situation. We're
2 human beings and that's what makes it really tough. And not
3 only that, this is all the human element. These are just
4 objects, folks. I hate these (indicating), I really do. All
5 they do is harm. I'm not going to offend the hunters, I
6 hope. But these are all tangible objects and all that kind
7 of stuff. We're living, breathing. We have cells, we talk
8 and we think. We are a product of every experience that we
9 ever encounter.

10 And when we present a case, Mr. Watkins or
11 Mr. Morrow and Paul, Paul sits on the stand -- he's a fine
12 officer, by the way. I've known him for years. He's a fine
13 officer. He does the job as best he can. As a matter of
14 fact, it's kind of curious, I like Dale Laux. He was the guy
15 from BCI and Dale was up there. I've known Dale all my life,
16 too. Well, not all my life but, I mean, since I've been
17 practicing, which is back in '72. And Dale, we would send
18 him materials to BCI Laboratories, get the results back, and
19 the one thing I argued a little bit with Dale about was that
20 BCI always when they said, "We'll get the best evidence," and
21 they kind of labeled it the best evidence rule and it really
22 isn't the best evidence rule. As a matter of fact, it's a
23 legal term used in legal jargon. What it really, what it

1 really means, and I think you're smart enough to hear that
2 what he said was as soon as we get evidence we like we're
3 going to move on. We're not going to check any of this other
4 stuff if it fits or theory.

5 See, that's the point. If somebody, if the police,
6 which they're supposed to do, they're supposed to come in
7 here, they're supposed to develop a theory, if they get a
8 theory or whatever, they start to develop it. The problem is
9 when you start developing it very early on and you get tunnel
10 vision to it, then you're only going to look for stuff that
11 is really going to help bolster that theory. You may not do
12 something, you may not look for anything else that may go in
13 the opposite direction. And that's just human nature and
14 that's the way the police operate.

15 But you know something -- I just diverted myself
16 from something. Here's what I want to say at this point.
17 You may not like how I present this case or how I act or my
18 demeanor or anything else, okay. I'm a lawyer. There are no
19 scripts here. This isn't "The Practice" you see on Sunday
20 night. There are no scripts. We don't have the writers. We
21 don't have any of that. Nate gets what he gets. He came
22 into court, they brought him in, and the Judge calls Tony and
23 I and says, "Here's your client," and that's the way it goes.

1 I may do a lot of things and I get emotional and you
2 see it. He triggers me. When he says certain things and
3 everything else, I blow up, and that's probably pretty stupid
4 on my part. But I haven't -- I'm still human, and even
5 though I've been practicing this many years, I will react to
6 those things. If I have offended any one of you in this jury
7 box, okay, I would ask you to forgive me. And if you don't
8 want to forgive me, that's okay. I'm a big kid. I can take
9 it. You can tell me afterwards, "You're an idiot, Lewis,"
10 and it's all right. Don't take it out on the case in regards
11 to Nate Jackson. Please don't do that. That's not what you
12 would want, okay. Just, just please, don't. Get the
13 personalities out of it. But we're all human and sometimes
14 that has an effect.
15 The objections, well, the State, they're the ones
16 that produced probably, I don't know, was it 500 and some
17 exhibits and all that, and we objected. Tony and I objected.
18 We think the rules aren't being followed. We have certain
19 rules to do things, and even if they're going to get the
20 evidence in, there's a certain way you got to do it. If you
21 have direct examination, if you have an expert, you got to do
22 it a certain way, whatever, okay? When we object we're
23 obligated to do that. I took an oath, I got to defend. If I

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1 don't do it the Supreme Court wants to take my license away
2 from me, so I got to do it, but sometimes it looks like we're
3 obstructing in some form or manner or we're trying to hide
4 something from you. The judge told you and he's telling you
5 the truth, we're not trying to hide anything from you, okay?

6 Cross examination, sometimes you see a cross
7 examination in a story or in a show, in a movie, or I don't
8 know if "The Practice" has it. You know, if they had told me
9 I might get rid of these Magoo glasses. She's probably
10 right. You see it on a show like "The Practice", something
11 like that, and you see somebody beat somebody up or whatever
12 in cross examination, or something or whatever. All cross
13 examination is, folks, when they bring the witnesses on, they
14 put Paul here, a fine fellow, they get him up here and they
15 put him on the stand and they ask him, you know, did you
16 investigate this case? Did you take care of this and take
17 care of that? They're going to bring out, Mr. Watkins and
18 Mr. Morrow are going to bring out the things that they think
19 is important for the development of their case, the
20 development of their theory. That's all they're doing, okay?
21 On the other side of the coin, when we call it cross
22 examination, which is kind of a -- it sounds like a sinister
23 term in some form or manner. All we're trying to do is bring

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1 out facts that may be helpful to our side of the case. In
2 other words, to try to get you a full picture.

3 If you think about it, sometimes when you ask people
4 things, if you ask them a certain way you're going to get a
5 certain answer. If you turn it around and asked them other
6 things you're going to get some different answers, okay? So
7 we're trying to get the whole story. And what it is is a

8 Paul Harvey thing, it's the rest of the story. You are
9 entitled to all of the story, okay, and that's what it boils
10 down to.

11 And in every case, in every case the defendant, I
12 don't care whether it's a speeding ticket or anything else,
13 all prosecutors are going to get up and say, well, I don't
14 care what the defendant testified to; I don't care what he
15 said on the stand; I don't care, everything else; it's
16 self-serving; he's charged with a crime so he has to be lying
17 about everything. That kind of puts you behind the eight
18 ball, doesn't it? What he's saying basically is if you were
19 in a traffic case and you are a defendant and you get up
20 there and you gave a statement, said, "No, I didn't speed,"
21 or whatever, that's a self-serving statement. But you're a
22 defendant, you're charged, so you got to be lying and
23 somebody else has got to be telling the truth. Well, no, it

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1 doesn't work that way. It just doesn't.

2 You are jurors, okay. You are the most powerful
3 element and component to the judicial system. You are more
4 powerful than I am, he is, or even the gentleman up there in
5 black. You determine the facts. You have the sole and
6 exclusive power to determine the facts. He, the prosecutor,
7 can't get up there and just say "I have overwhelming
8 evidence. Ladies and gentlemen, it's this, it's this." He's
9 preaching to you. He wants you to believe that.

10 In this whole case we've been arguing about the use
11 of the terms his, her, pronouns, was it her property, that
12 property, whatever. You folks are smart enough to understand
13 where we're going with this and what the exhibits tell you.
14 And I'm going to go into a story here and I'm going to give
15 it to you, okay. It's my opinion as to what some of the
16 evidence has shown you in this case, okay. It's not going to
17 be his version.

18 And that's interesting, too, because when he says
19 it's a diversion, the State -- or the defense is going to
20 give you a diversion, he wants you to believe that I'm going
21 to trick you somehow, okay. Well, I'm not going to trick
22 you. You're smarter than that, I just told you. You're
23 smarter than I am, you're smarter than he is. Okay. You're

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1 individual jurors with your life experiences. There's 12.
2 You individually can beat all of us hands down. We put you
3 together as 12, that makes you the most powerful people,
4 because you will be able to remember all the facts. You will
5 remember something, you will remember something, and it will
6 fit in. You've been given a huge, huge puzzle here, jigsaw
7 puzzle, and the question is how do you put the pieces
8 together.

9 And I don't care what the prosecutor tells you and I
10 don't care what the defense lawyer tells you, this, this, you
11 choose where it goes. You figure out for yourself. You
12 determine this case. Because all the letters are here and
13 it's noticeable that all he did is one line or a couple lines
14 here. Oh, there are statements about oh, we're going to
15 kill, we're going to do this, whatever, but wait until you
16 get into the letters and read them all, okay.

17 The one thing in this case is the standard of proof.
18 It's a very powerful thing. It's called beyond a reasonable
19 doubt. Okay. Prosecutors, they talk about it, say firmly
20 convinced. We have a very loose -- we have a -- ours is not
21 a very high standard in comparison to a lot of other states,
22 but the wording of reasonable doubt is going to be given to
23 you in your final charge here given by the judge. And

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1 there's -- the last line is probably I think, in my opinion,
2 is probably the most important line in here and what it says
3 is proof beyond a reasonable doubt is proof of such character
4 that an ordinary person, i.e. us, all, right, would be
5 willing to rely and act, rely and act upon it in the most
6 important of his or her own affairs. Okay. How do you
7 interpret that? How do you define that? Each one of you,
8 it's up to you.
9 Some may think, well, that's no big deal, and other
10 people say that sounds pretty serious. Well, start thinking
11 about it. Maybe it's a situation where we have, we're
12 getting married, you know, and you ask your future partner
13 will you marry me and your future partner hesitates. He
14 doesn't give you an answer right away. What happens? I
15 don't know. I'm a guy. I ask her to marry me, she's oh,
16 yeah, well, I think we are going to do it next May. That
17 hesitation, that's one of the most important things in your
18 life. Who are you going to spend the rest of your life with?
19 Who are you going to raise children with, whatever? You
20 would expect a quick, probably a crisp answer I would hope,
21 but if they hesitate and don't say anything, what does that
22 do to you? It puts doubt in your mind. We're not talking
23 about whether to go to the grocery store today, we're talking

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1 about the most important things in your life.

2 How about a child in medical care. Your child has,

3 his leg is bruised, it's swollen, it's red. You take him to

4 the doctor, you take him to an HMO, you take him to whatever.

5 The doctor looks at it, goes in, supposedly examines it,

6 comes back out and says we have to amputate your child's leg

7 right now. Okay. And do you really as a parent, would you

8 really just say okay, let's go? Would you really do that?

9 He's a professional. He's supposed to know what he's talking

10 about.

11 We had professionals, Dr. Germaniuk. And you know

12 something, Dr. Germaniuk, he's a straight shooter, he's a

13 good guy, he really is. I'm not defiling their witnesses.

14 I'm not going to attack their witnesses. I'm going to use

15 their witnesses because he says these are good witnesses.

16 I'll use his witnesses because we all know that we can't

17 believe a defendant or anybody the defendant puts on because

18 somehow we're defrauding. Well, I'll use his witnesses.

19 Getting back to Dr. Germaniuk, he is a straight

20 shooter. The point is that even professionals, whatever,

21 they may not have the right answer or you may not just trust

22 them, you've got to have a little bit more. I want that

23 second opinion. I want to find out what the deal is here.

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1 Your child has a bacterial infection, da, da, da,
2 da, da. First thing comes in mind, well, bacteria, let's
3 see, antibiotics. Antibiotics are good against bacteria,
4 they aren't good against viruses. You start thinking, okay.
5 I got a second opinion. You want a third opinion. You know
6 what a lot of parents do when they start getting into that
7 situation? They even go on the internet, they go to the
8 medical schools, they get the medical books out and what do
9 they do? They do it for themselves. Okay. They find out
10 because they're concerned enough and they're not just going
11 to take somebody's word for it, okay, and that's what I want
12 you to do in this case. I just don't want you to take his
13 word for it because that's not what this case is about. And
14 it's not just my word, okay.
15 I want you -- you took an oath, okay, you took an
16 oath and now you're a juror. You're here. You're good
17 people. You have character. You were chosen for your
18 intellect, you were chosen for your fairness, you were chosen
19 for your open-mindedness, and you were chosen with one great
20 idea in mind is that you would take an oath seriously. I'm
21 here, I've listened to this and this is my country, this is
22 my system. This man up here in the black robe told me what
23 my job is, okay. The question is take it seriously. If you

1 don't want to and blow it off, fine, you just have to live
2 with yourself. That's what it boils down to, okay. But I
3 know you're going to do a good job in this case, okay.

4 Judge, I would like to -- we can break now and get
5 these good people out to lunch and bring them back and
6 I'll --

7 THE COURT: Fine.

8 MR. LEWIS: -- finish up.

9 THE COURT: Yeah, because we'll be a while
10 yet with rebuttal. One hour please. Be back at 1:00. Not
11 to discuss anything, form any opinions until you return.
12 Thank you. Have a good lunch.

13 (Whereupon, a luncheon recess was taken.)

14 THE COURT: Okay. The jurors are all
15 returned and seated. Everyone is here. Mr. Lewis, you were
16 in the middle of your closing.

17 MR. LEWIS: Most people hope it was the
18 middle, judge. Maybe it's not. Folks, what I want to talk
19 to you about now is try to put the whole scenario into
20 perspective for you, put it into something you can understand
21 and talk about. Draw on your own personal experiences. I'm
22 going to use the evidence that was produced here. And what
23 we're talking -- am I loud enough? I'm trying to be soft and

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1 I'm trying to be slow. I go too fast. The court reporters,
2 I don't get any Christmas cards from them, I go too fast, so
3 I'm going to slow down, and Kelly wants me to make sure that
4 my voice stays up. I'm starting to lose my voice. I told
5 the prosecutor that I'm worn out, I'm exhausted. This is --
6 I've got to find a different line of work here I think. This
7 wears you out.

8 Let's talk about Donna Roberts. Let's talk about
9 Robert Fingerhut. Those people were in Miami, Florida, Dade
10 County. In 1985 they got divorced. For whatever reason,
11 they decided to move north, they came to Trumbull County
12 probably about 1992 or '93, and when they came to Trumbull
13 County, to Ohio, okay, if you're divorced, you're divorced.
14 The law doesn't recognize any relationship between the two of
15 you. You go down to domestic court, you may have children,
16 support, that kind of thing. You're all familiar with that
17 kind of situation. But for some reason they came to Trumbull
18 County and Mr. Fingerhut decided, and Donna Roberts, he got
19 into business. And it starts off with they buy a house,
20 okay.

21 When I say "they" I'm totally incorrect about that.
22 Donna Roberts bought a house because the law only recognizes
23 the owner of a piece of property, real estate, as the title

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1 holder, the deed holder. It's in the evidence that it's
2 Donna Roberts, okay. The prosecutor, what they're saying in
3 this case is it doesn't make any difference, you know, how he
4 was there or whatever he was there, he had a right to be
5 there or that kind of thing or whatever, okay. Anthony will
6 give you the law in regard to that. What I'm getting to is
7 something that's very unusual about this case.

8 When I first got involved in it, like I said, the
9 judge calls me up, sends me over, and, you know, we started
10 looking at the case, and the more and more I see I start to
11 wonder and wonder and wonder. And I'm a curious animal, I
12 always am. When something just doesn't look right, doesn't
13 smell right, it's like something is wrong here. So in 1995
14 Robert Fingerhut, Donna Roberts, aren't married, already
15 divorced, Donna Roberts buys a house up in 254 Fonderlac.
16 The deed is taken in her name. She takes a mortgage on it.
17 She's the only one liable. Okay. Unusual.

18 A lot of times you'll have this situation; you'll
19 have a husband and wife, they'll buy a piece of property. If
20 the man is in a business his name will be on the business,
21 the wife will be on the deed to the house. What it does is
22 basically protect them from liability, okay, and that is not
23 an unusual situation. But this, this, this didn't make any

1 sense to me, so let me go through it.

2 Buy a house in Fonderlac. She's on the deed, she's
3 on the mortgage. Okay. They're not married but evidently
4 they reside in the same house. The situation would be this,
5 is that if she owns the house, she has the deed, they're
6 unmarried, then basically in order for Mr. Fingerhut to stay
7 in control and keep whatever he has in regard to that house
8 he has to control her. Okay. It's simple. Because if she
9 gets mad one day and wises up or figures this out and says to
10 him, "You know something, Robert, you've been treating me
11 ugly and bad," or whatever. "We don't have any relationship
12 at all. I'm going to call the police," Howland, wonderful
13 officer, Paul Monroe, "I'm going to call him right now and I
14 want you out of the house," and she has every legal right to
15 do it. If he wouldn't leave the police would escort him out.
16 If he would attempt to take anything out of the house
17 technically he committed a burglary. That's the problem with
18 this whole situation if you start thinking about it. That's
19 what makes it so unusual. And it gets more unusual, it makes
20 sense, when you get down the road here because it comes into
21 play.

22 The prosecutor says or tries to minimize that. This
23 is my so-called diversion that I'm giving you. Well, I'm not

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1 giving you any diversion, it is what's in the evidence, okay.

2 It's right here, it's in the paperwork, and you can see it.

3 decides to 3 5 10 love. So she's on the deed, she's on the mortgages. She

4 has complete control over that house. Whether she actually

5 knows it mentally I don't know. The point is Mr. Fingerhut

6 has got her convinced and he has to control her because if

7 she decides for any reason to throw him out, she could have

8 him thrown out immediately. It's her house. The law would

9 say it's her house. He has no interest. I don't care if

10 it's a \$50,000 mortgage on it or 70,000, subtract it, that's

11 hers. I don't care if it's 170,000 and 100,000 sitting

12 there. I don't care. It's her house. She has complete

13 control over that, although Robert Fingerhut is the one here

14 who has to control her in order to keep himself in that

15 house. That's what it boils down to.

16 If she would go talk to any lawyer, this fine

17 gentleman, myself, she says, you know what I'd tell her?

18 That's your house. You don't want him in your house, he's

19 not a husband. There's no interest. If you would get

20 divorced there would be a split of property, but you don't.

21 You're divorced. You buy it. It's not. So, you know, you

22 start thinking, well, why would Robert Fingerhut do that?

23 Why? Why was he, why is he doing this, because it is

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1 unusual?

2 What's worse is that if she decides to find somebody
3 else and she decides to fall in love, or whatever you want to
4 call it, and bring somebody else in the house, she could do
5 it. In this case she could quite literally, if she knew
6 better, she could go pick up Nate from prison, stop off at
7 the local chapel and just bring him on home. She can go
8 home, it's her house, bring him right in, and Mr. Fingerhut
9 was smart enough to figure that out because he's the one that
10 developed the whole thing.

11 It's interesting because in the letters, those
12 letters -- I tell you what, the letters, there's a lot. I'm
13 going to talk about those in a few minutes more so, and
14 there's so many letters. There's everything in those
15 letters. There's sex, you name it. The point being is
16 you're going to have to be good people and plow through it,
17 do the best you can with it. But one of the letters in the
18 late -- and the most important I think of the letters is
19 really, it's the October, November and then a little bit into
20 December, and you got the 20 tapes, okay.

21 And let me interject this right now. I'm going, I'm
22 going to quote some passages out of these letters, but what's
23 important later on is you have to listen and read the whole

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1 letter or you have to listen to the whole tape. It's going
2 to become very important. But at the end she writes, well,
3 he's gone crazy. He's really treating me ugly and this kind
4 of thing. You'll hear about it. And she says, well, he's
5 going to come home and lock me out, change the locks on the
6 doors. That's kind of interesting. The law doesn't
7 recognize him as an owner to do that. She's the one. He
8 goes changes the locks, she can call the police and out he
9 goes. But evidently she doesn't know that, and it would be
10 important that she not know that.

11 Rental properties, okay, it becomes the same
12 situation. Donna May Roberts becomes the title holder, the
13 deed holder, she's liable on the mortgages, okay, and for
14 rental properties, assuming that she would receive the income
15 from the rental properties. Robert Fingerhut has no legal
16 interest in the properties. Okay.

17 Mr. Watkins was saying that Donna had a great life,
18 okay, she was spending too much money. Well, if that was the
19 case in this relationship, if that was so bad and everything
20 else, Robert Fingerhut couldn't be stupid enough to do all
21 this, put everything in her name, if she was that
22 spendthrift, so he would put it in his name to make sure she
23 couldn't spend it. Well, see, it doesn't make any sense if

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1 you think about it for a minute. It's in his name.

2 Kathy Thomas, the insurance agent. Fonderlac, the
3 insurance was in her name because Robert Fingerhut had no
4 interest in the property. The rental properties, all the
5 insurance was in her name, not Robert Fingerhut's. He had no
6 power. What did Kathy say? I asked her, I said Kathy, if
7 Robert Fingerhut called you up to cancel that insurance, what
8 did she say? I can't cancel that. She's the owner. She's
9 the insured. He has no insurable interest. So you got a
10 house, they have rental properties. The rental properties
11 produce money.

12 There's another letter in there you'll see that as
13 the situation deteriorated over about the last year, year and
14 a half before this happened, you're going to see one of the
15 letters where Donna says, you know, all I was living on was
16 an allowance of \$100 a week, and at the end he even cut off
17 the \$100. And at that point figure that out, she got an
18 allowance of \$100 a week. That's \$5200 a year.

19 When you see the credit apps on here, the yearly
20 income of that business was 250,000 or 100,000 in business
21 revenue. These are the credit apps, incidently, that went
22 through Preston, went to the bank and came back and said
23 you're A-okay, babe, and that's Donna Roberts, that's not

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1 Robert Fingerhut, because she was the owner and operator and
2 franchisee. So you have the rental properties but evidently
3 Donna wasn't getting the money out of those properties.

4 Get to the automobiles. Okay. We have automobiles.
5 Robert Fingerhut goes and he negotiates the sales of these
6 motor vehicles to buy them, as Carmen would say. And Carmen,
7 he got a lot of good business out of Robert Fingerhut.

8 Excuse me, it was Mr. Roberts. Mr. Roberts. Carmen knew he
9 bought five vehicles, I think it was five vehicles, he knew
10 him for five years, okay, and he didn't know, he didn't know
11 until he saw the picture in the paper that his name was
12 Robert Fingerhut. Now, it's an amazing thing. And if you go
13 to Barry Ricker who does the maintenance, two years, that man
14 is Mr. Roberts. There was a movie, Henry Fonda. I don't
15 know. But he wanted the world to believe that he was
16 Mr. Roberts.

17 Now, think about this, folks. The prosecutor says,
18 well, you know, they're carrying on this marriage
19 relationship so we have, I guess, Mr. Fingerhut now takes the
20 maiden name of Donna Roberts. Okay. Think. How many people
21 do you know do that? Or how many people are called by
22 another name for five years and don't say I'm Mr. Fingerhut?
23 That's so unusual. Can I give you an exact answer? No. I

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1 I don't even know, according to all the assets and the income
2 and the ownership of the franchise and everything else, we
3 I don't even know if Mr. Fingerhut ever filed a tax return. I
4 I know she did because she passed a credit report and that's
5 where all the money was, through her. Did he exist? What,
6 you know -- I can't -- I don't know the answer. I don't know
7 what he's hiding from or who he's hiding from, but it is too
8 bizarre to be just something that just happened.

9 The motor vehicles are insured. They are leased by
10 her. The mortgages through the banks in regard to that,
11 those leases, in her name, so she has the vehicles.

12 The next item is the Greyhound business. Who owns
13 the Greyhound business? Donna M. Roberts. She's the owner/
14 operator. She would be the one who receives all the money in
15 her name, but evidently somebody else controls it, okay, but
16 she's the owner. So the business is insured by Kathy Thomas,
17 she told you. It was insured, Donna Roberts. Would you
18 change the insurance? No, huh-uh, because she's the
19 franchisee, she's the owner of the Greyhound business. Okay.

20 Is this a deal where supposedly that Donna Roberts
21 is -- I don't know. The prosecutor hinted that -- oh, that's
22 right, the prosecutor said that this woman was I guess
23 evidently too dumb or whatever to run the businesses, okay.

1 I guess that was his philosophy about this. But the reality
2 of it is this: You cut through everything, Mr. Fingerhut was
3 controlling everything. Donna Roberts owned everything. In
4 order for Robert Fingerhut's life to continue as it did
5 before this, he has to do one thing, he has to control and
6 make sure Donna Roberts doesn't decide to throw him out, call
7 an attorney, fall in love with anybody, bring anybody else
8 in, because otherwise he doesn't exist. He wouldn't exist.
9 Think about that for a minute.

10 Mr. Monroe comes over, Fingerhut, you're out of this
11 house. Mr. Fingerhut, you are not to have those two cars.
12 Touch them, you'll be arrested. Mr. Fingerhut, that's no
13 longer your business, that's Donna Roberts' business.
14 Greyhound contracted with her. She gets the money. The
15 Greyhound business is the engine that produced the profits,
16 that produced the money every year, okay, so you start
17 thinking about it. It makes some sense.

18 Not only that, let me just give you a picture here.
19 Let's just flip this around and see what happens here. Let's
20 do a scenario like this: Let's just say that we got what we
21 got here, Robert controls everything, owns nothing. Doesn't
22 exist. We have Donna Roberts and we have Nate Jackson as a
23 boyfriend and Donna Roberts turns up dead and there's a will

1 and the will is Donna Roberts' will and that will says I
2 leave everything to Robert Fingerhut. The prosecution and
3 the police would be looking very seriously at Mr. Fingerhut.
4 They would be in a trial and he would be up here telling you
5 that Robert Fingerhut had every motive in the world, more
6 motive than anybody else obviously, to get rid of Donna
7 Roberts because how is he going to get his property from her
8 to him? Is he going to hold a gun to her head and force her?
9 How is he going to do this? That's what becomes the problem
10 here. That's what becomes the whole crux of what we're
11 talking about here. The man that doesn't exist. Okay.

12 So what have they got? When you go on, and let me
13 just quote some of these letters, okay, and some of the
14 phrases out of them. You'll see them, but these letters
15 really have to be read, the whole thing, and the taped
16 conversations have to be listened to. The question is does
17 Robert know he's in trouble? Does Robert know about Nate
18 Jackson? Well, the interesting thing was that Mr. Sanchez,
19 the security guard at RTA, he said did you ever see Donna
20 Roberts? Yeah, I saw Donna. Did you ever see Nate Jackson
21 down at the terminal? Yeah, I saw Nate Jackson down at the
22 terminal. Did Robert Fingerhut know who Nate Jackson was?
23 Oh, yeah. There was no doubt in my mind. He knew who he

1 was.

2 And as this thing gets closer and goes through the
3 beginning of '01 and getting up through December you can
4 tell from the letters where he starts trying to -- he abuses
5 her, he yells at her. Not probably the right procedure,
6 shouldn't have done that, but he was just giving her all the
7 grief he possibly could because two things happen. No. 1, he
8 has to get it turned around so she decides not to pull the
9 plug. No. 2, he's got to make sure that he keeps some kind
10 of control over her, otherwise the plug is gone anyway, it
11 doesn't make any difference whether Nate Jackson exists or
12 not.

13 The letter of 10/2, "Why didn't you leave Robert and
14 come be with me when he use to beat you or piss in your bath
15 water," I don't know about that one, "or send you to the
16 hospital like you were for some days when ..." I first met
17 you.

18 10/16/01, "I go straight home - feed the girls and
19 lay down and think. I am not out there with anyone else -
20 how could I be in this frame of mind? Plus the fact that he
21 is on the warpath again taking it all out on me. He calls me
22 a piece of shit now along with other sweet greetings. You
23 have to understand how bad it is for me ... besides our

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situation."

10/20, "Nate, if you only knew how difficult it is
at home now... you wouldn't believe it. He is almost
irrational at times. And oh - guess what? Remember how I
told you he guesses like right on the money sometimes?" He
was a PI in Florida, you know. This man is not dumb. "Well,
he did it again! He came home one night and said you've been
home now for over a month and the phone ..." calls "... the
phone bill is high - I see your boyfriend must be back in
jail." Robert knows who Nate Jackson is.

11/9/01, getting down to crunch time, folks, because
I think Mr. Fingerhut knew, or he did know later on for sure
when Nate was coming out of prison. "And I'd better get that
hallway at home widened because we keep brushing by each
other." Last night we passed in the hallway and he must be
just really full of rage because he shoved me real hard into
the wall and said - I don't want no n---r lover coming near
me. I just picked myself up and didn't even say a word. And
for some reason he left me alone the rest of the night."

11/9 again, "Well there was a long silence and he
called me a n---r loving bitch again and hung up. Oh and he
said not to call him for anything that he doesn't want to
even hear my voice and I'd better stay out of his way tonight

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1 because - well - who cares..."

2 11/10, "I guess I'll just let him continue to bully
3 me and lash out at me and just stay cool..."

4 There's numerous examples in here, ladies and
5 gentlemen, of the fact that Robert knew. And even if you
6 don't pick it up in the letters, okay, now, here's -- okay,
7 what, what the prosecution wanted to do was say listen, we
8 want all of the good stuff out of these letters, okay, we
9 want this wonderful plot to kill, we want that out of there,
10 but anything else you read in there that says something
11 different, then we don't want you to believe it. I mean,
12 that's the way their attitude is always going to be, whatever
13 the evidence. I don't care if they introduced it or what, if
14 it's not beneficial or a little bit contrary to their case,
15 no, don't believe it, it's irrelevant. But the letters tell
16 you. You follow the chronology of the letters, okay, and
17 they will get you to the point where you will see that he
18 gets worse and worse and more wild as it goes along.

19 And it's not just an abuse thing, okay, it's a
20 problem he's got that he can't cure. He's lost control over
21 her. Nate is coming home. But it doesn't really make any
22 difference about Nate in theory because he's losing control,
23 period. Forget Nate for a minute, forget he's coming home

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1 from prison. Forget he's even coming home. All she had to
2 do is go down to the lawyer's office and say, you know,
3 that's enough, you're out, and that's it and he's out. How
4 would any of us feel if our whole existence, the house where
5 I lived, the cars that I drove, the business that I had,
6 everything, was going to go down the drain just like that?
7 Is it the kind of thing you just sit back and say, ah, c'est
8 la vie? No big deal. No problem. You know, who cares?

9 But we know for sure on 11/29 that Robert knows.
10 There's a guy named Sandy, who is really Santiago Mason, and
11 he ends up probably about two months before, December, in
12 November sometime, with Donna, ends up stealing the Smith &
13 Wesson .32 from her and some money. And she had befriended
14 him and she went down to the police at, I might tell you, at
15 Nate Jackson's begging and pleading, and filed charges. And
16 Mr. Santiago called up Mr. Fingerhut and you'll see it in the
17 telephone conversation, in the letters, that he told him
18 everything about Nate was coming out, what he's going to do
19 and everything. I mean, it's as point blank as possible.

20 The conversation of 11/29/01, "And then he got to
21 mine, he read it and he came out and he says he charging him
22 with fifth degree felony," down at the prosecutor's office.
23 "Looked him up, he came up on the computer and his ass is in

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1 big trouble now. So you didn't get my other Tuesday letter,
2 how it said that he called Robert."

3 of me. "Un-huh!"

4 "Yeah he called Robert ... when he was at
5 Greyhound."

6 "Yeah."

7 "Told him about you and me, everything he knew that
8 I told him for two months."

9 "What?"

10 "Yep."

11 "See ... what I'm saying sweetheart."

12 Same conversation, here's the deal where -- "You
13 know what, I was ... down Tuesday because Robert called me.
14 He wasn't coming home, he's staying in a motel now sometimes.
15 I'm not getting any more money and he's ready to ... change
16 the locks on the house now and he's. All he does is say go
17 suck some nigger's dick, why don't you get out you nigger
18 lover. He even told ... I sent you money. That was the
19 worst part he could of told him." That's what Santiago.
20 Sandy, tells Mr. Fingerhut.

21 Mr. Fingerhut at this point would be getting a
22 little bit desperate. He doesn't give a damn about Donna and
23 Nate in that sense of the word. He doesn't love her. He's

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1 got another problem.

2 Same conversation, "I mean, he is ... crazy man now.

3 He beat the fuckin' shit out of me. You should see me. I

4 wrote in my letter, if you saw me you would kill him with

5 your bare hands. I got two good punches in though. I

6 punched him. I had to and ... I kept bending down into a

7 little ball so he wouldn't hit my face but he got me."

8 "Does your face look bad?"

9 "Finger." "How does a woman look with a black eye? Good or

10 bad?" "Bad."

11 "Oh man." "Nate said

12 "I'm wearing fucking sunglasses in the winter here.

13 People think I'm out of my mind."

14 "I broke a middle, oh never mind," something or

15 other.

16 Robert knew. Robert knew so well. What's Robert

17 going to do about this? What's Robert going to do about

18 this? What are you going to do, are you going to try to

19 coerce Donna to transfer all the property? Well, we're not

20 getting along too good with Donna. That may not work. Nate

21 is coming home. I wonder if we can talk to Nate. If I can

22 get him to back off or if I can get him out of the picture a

23 little bit maybe this will all settle down somehow in some

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1 way. But Robert has got to do something. He's got to do
2 something, otherwise his existence is gone. And when I say
3 that fast I mean that fast. The prosecutor knows it.

4 Like I said, if you turned the tables he'd be
5 pounding this podium and saying ladies and gentlemen, Robert
6 Fingerhut had every motive in the world to kill her. I
7 believe it too and that's the way the lines go, okay.

8 Now let's talk about we've got those two, we've got
9 Donna and we've got Robert Fingerhut, got to December 9th,
10 okay. All right. That's the scenario. Those are the
11 characters, okay. Let's talk about Donna and Nate, okay.

12 It's about a two-year relationship. They obviously saw each
13 other down at the Youngstown terminal and other places, okay.
14 In the winter of 2000, 2001 he was in prison, then for four
15 or five months during the spring or summer he was home, and
16 then he ended up back in prison for the fall and winter up
17 until December 9th, okay. And he lived in a spacious flat.
18 It was four feet by 10 feet. I don't know whether that's the
19 bed up or down or whatever, but it's a pretty small place,
20 and he had a bunkie, too, so I don't know. I don't know if
21 he exactly measured it, but even the officer that came in,
22 the security officer, indicated that for most of the time,
23 for 23 hours out of 24, he's in a cell, whatever the case may

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1 be.

2 He had a relationship with Donna Roberts, no
3 question about it. They could date. She's divorced. She
4 could be with anybody she wanted to be, okay, so they keep
5 communicating. He was in a jail cell. He didn't have
6 anybody to talk to. He's not going anywhere, he's in a
7 cubical. Is he going to communicate? Sure is. Got a
8 girlfriend? That's nice. So they go ahead and communicate
9 and you end up with all these letters.

10 And when you read the letters and listen to the
11 phone calls, the prosecution, I know what they want. They
12 want you just to kind of ignore everything until you hit that
13 one thing that says oh, this is the plan, we're going to do
14 this, whatever. Okay. What I would like you to do, and
15 you're good jurors and you're going to do it I think, is you
16 are going to read the whole letters and figure out what's
17 going on.

18 Donna Roberts, you will see even in the brief
19 telephone conversation you heard, she uses everything she can
20 possibly use with Nate. You got to remember, Nate is in a
21 cell. He ain't going anywhere. He can't do anything. So
22 she does the old "I love you, baby," this kind of stuff,
23 whatever. Well, I don't think anybody was loving Nate when

1 he was in prison, whatever, so it's nice to hear somebody
2 loves him.

3 Sex? Oh, yeah. She wrote letters and he wrote,
4 responded back, sexually. You're going to read them and be
5 embarrassed, whatever. The point is they are high powered.
6 I've never seen anything like that in my life, and it's sex.
7 But here he is, he's in a four by 10 cell. He doesn't have
8 any women and he can't call a collect number out of there and
9 get a sex line, so she's going to give him sex. They talk
10 about it and talk about it. She does that.

11 She uses the jealousy thing. In fact, it's kind of
12 curious. The prosecutor mentioned it. In November, December
13 they broke up basically. You'll hear the telephone
14 conversations and also the letters, they literally broke up,
15 says that's it, we're finished, because he had the five
16 girls' names in his sneakers or something like that, and
17 we're calling it quits. That's the end of the relationship,
18 boom. Okay. And, of course, Nate, he wasn't -- he didn't
19 want to cut it off. He wanted the letters. He didn't want
20 to cut it off. Donna, I'll do anything for you. I'll do
21 anything for you. Yeah, yeah.

22 So read the letters, and when you start seeing the
23 plan come up notice where the plan comes up. The plan always

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1 comes to fruition or it's mentioned or something when he's
2 trying to please her. Is this what she wants? Yeah. Let's
3 talk about it, this is what she wants.

4 There were two instances, one with the phone numbers
5 and then some other phone number for a girl that had an
6 apartment, and he tried to explain that he was probably going
7 to stay there to try to get an apartment when he got out of
8 prison. She also used the jealousy thing with some neat
9 looking or handsome looking customers. There's some other
10 black men here hitting on me, she hits him with that.

11 Be my protector. Oh, save me, save me from all of
12 this. Save me from this. You're a strong guy. And knowing
13 Nate, having his background, it's like, you know, he's not
14 going to impress a woman with money, cars, he doesn't have
15 nothing, so I'm going to be protective. I'm going to help
16 you, babe. I'm going to do this for you. He's in a cell but
17 he's going to say he's going to do those things for you.

18 Sometimes she actually puts him down and calls him
19 stupid. He's not too happy with that but he tries to turn
20 around and says how smart he is. Boom, here comes the plan.
21 Sometimes she builds him up, says Nate, you know, if you just
22 hadn't have been involved in all this stuff or whatever you
23 would have been a very smart guy, you would have been a

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1 success, puts that in there so she gets him pumped that way.
2 Nate, this is the good life. There can be a good life out
3 there for you.

4 You're smart jurors, okay. Yeah, there's casual
5 mention of the so-called plan in there, but read and see how
6 she works him. She works him good, because every time
7 there's a problem she's after him, or whatever he does he
8 retorts and says oh, well, let's do the plan, or let's do it,
9 because he's trying to please her and he's trying to not cut
10 this thing off. It's all he's got, folks. He's in a 10 foot
11 cell.

12 And not only that, you think about this for a
13 minute. The prosecutor showed you or read to you the letter
14 way back in May or April and he was in prison at that time.
15 He came out and he was down at CCA walking around town and
16 everything else and this plan supposedly developed back when
17 he was in prison the first time. And there was a letter in
18 there indicating well, I would have done it, I would have
19 done it, but you stopped me. Watch in there how many times
20 he says I would have done this but you stopped me. That's an
21 interesting concept. It's kind of like -- I can't get the
22 analogy. It sounds like, it sounds like, you know, when you
23 are husband and wife and the wife says I want you to do this.

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1 Oh, I'll do it. Well, I didn't think you wanted me to do it
2 right now. I mean, it's kind of like an analogy. I'm really
3 trying to get out of it but I want to say it was you that
4 stopped me. Okay.

5 I believe Nate Jackson is a big chicken. He wasn't
6 going to do nothing. He said all this macho stuff, decided
7 to talk to her, make her happy, say what he wanted to say,
8 exchange the sex words, all of that kind of good stuff, but
9 if you read carefully and you see it, you can tell. Like in
10 November 27th he hedges. Every time he talks about it he
11 hedges. I see. Oh, wait a minute. I'm sorry. I'm on the
12 plan, the other plan. Okay.

13 If you look at it, though, the letters, and I'll
14 show you in a minute, is that he hedges. He always keeps
15 saying you stopped me from doing it, if you don't want me to
16 do this then just tell me you don't want to do this. Thou
17 does protest too much. That's what it boils down to, he
18 ain't going to do it. He just says -- he wants to be the
19 hero and say those things, and then when the time gets short
20 and he's got to come home, I ain't really going to do it but
21 I don't want you -- I don't want to have to say I'm not going
22 to do this because then I ain't a man, or whatever, I'll
23 displease you. But he keeps asking her well, do you want me

1 to do it, huh? Yeah? No? He wants out. He ain't going to
2 do it, it's as pure and simple as that.

3 All right. Let's talk about the plan. There were
4 so many letters and so many phone calls about the plan. Let
5 me give you an example. Evidently the last plan, or the one
6 the prosecutor keeps throwing out, wasn't the first plan or
7 it wasn't the favorite plan, it's his favorite plan, but

8 here's the example. This the letter of November 27th, okay.

9 Whoops, I should probably -- yeah, okay. "... I hate to risk
10 my life by just walking into the station an doing it an

11 taking the risk of getting away, so if you really wanna be
12 with me like you say, an if you really want ... to have a

13 real life, well then you would just sit back do as I say

14 don't give me no lecture an let ..." me get things "... done

15 an over with, because the next lecture that you try to give

16 me I'm just gonna change my mind an ask you to never talk to

17 me about it again." I guess his plan wasn't good so he got

18 mad and he says fine, don't talk about it again, or you don't

19 want to go along with me, then fine, I'm just not going to do

20 it. Well, it's a macho way of trying to get out of it. Oh,

21 I can do it, I can do that, but doesn't do it.

22 So that plan was he was going to run into the

23 station and shoot Robert evidently. That's all I can figure

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1 from this thing, okay, because in her letters in addressing
2 that here's what she says, "Anyway I am so worried about that
3 delivery. I mean, a moron could figure it out." Also, "I
4 may also be - no, not may, I will be in the line of fire too.
5 I could end up you know where." I guess she's at the
6 Youngstown station or whatever and she's not getting shot. I
7 guess that wasn't a good plan. Okay. Let's scrap that baby
8 and not worry about it. That was down the drain. Let's go
9 back to the drawing board and figure this out.
10 So then we get to the plan, the one the prosecutor
11 likes and everything else. We got to have a ski mask, okay.
12 Donna, get me a ski mask. In the letters you'll see she'll
13 say, well, I went shopping and everything else and I really
14 couldn't find one, I really couldn't. I don't know how hard
15 it is to find a ski mask, I mean, they sell them in every
16 store, but she couldn't find one for some reason. And then
17 on -- right close in the last part of November you will hear
18 the conversation here, no, he don't want any mask because
19 she's a tough guy. Whatever. Okay. It will happen the next
20 day he told you, it's gonna happen, Donna, I promise you,
21 it's going to happen the next day. The next day, the next
22 day. As far as I know that was Monday the 10th. They had
23 their romantic get together. They were in the Wagon Wheel,

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1 okay, he got her to get the room. He had his sex, okay.

2 It's gonna happen on Monday, I promise you, I made up my mind

3 this is going to be over with on 12/10.

4 Gloves, did you find the gloves? I guess the

5 prosecutor found something. According to one letter, she

6 couldn't find the right kind of gloves or whatever. Very

7 hard to find evidently, but evidently she found some gloves.

8 And no one is to know that Nate, Nate is out of

9 prison. I mean, we can't have Nate running around. I mean,

10 the greatest alibi in the world is to be in prison, or at

11 least you don't want to be seen, you don't want to be seen,

12 and that's what they talk about. Oh, it's going to be a

13 trick. You're going to stay here for two weeks without

14 anybody seeing you. Yeah, I'm going to do that. Everybody

15 is going to think I'm still in prison. Okay.

16 Get rid of the letters. He's right. We got this

17 great plot going, we got to get rid of these letters. We

18 don't want them be found in the dresser of the room in which

19 was called the master bedroom in which Robert Fingerhut, I

20 guess, was sleeping because Donna was sleeping in the other

21 room. I wonder if Robert Fingerhut ever found those letters?

22 What a PI. I think he found the letters, folks. He knew

23 everything that was going on. But, you know, the curious

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1 thing is that, you know, this is going on but if he calls the
2 police that doesn't help him at all. That's still her
3 property. He can't win that way. He can't win. He got
4 himself in a hole, and a big fat hole, and he can't do
5 anything about it.

6 And another thing Donna Robert says, hey, this would
7 not be a good time with the Santiago problem, this would not
8 be a good time to be contacting the police because, you know,
9 we got this plan, we got this plan. I think that's pretty
10 smart, too. I don't think I would be running around
11 contacting police and five days later the person that lives
12 in your house ends up dead. So you have that premise, that
13 would be I think the plan, supposedly going to be at the
14 house. A couple of things that says well, maybe be in the
15 house or whatever so it's all over the place. We have
16 generally the idea. Okay.

17 So before I talk about the plan that didn't exist or
18 didn't happen there's one thing that's important about this,
19 folks, is you know it was all set up and everything else,
20 then after the fact some of plan would fall into line. Here
21 is some of the letters that show you that basically -- if I
22 got the right thing. There's the October 20th, '01, "An
23 Donna I don't care what you say but Robert has to go! An I'm

1 not gonna let you stop me this time. An Donna you know that
2 I've always wanted to live my life with you an only you ..."
3 It is 10/24, 31, "It is always tied to this "I want to live with you forever"
4 and "I love you so much," you know. It's always something
5 with all the other stuff. You will see in some of the
6 letters they break up. They want to make love, he talks
7 about sex, and then they talk about the plan. I mean, it is
8 like multifaceted. But you will read it, you will figure it
9 out. You will see between the lines, as they say. Okay.
10 All you have to do is read the line and it is right there for
11 you.

12 And another one, this is 10/16, "An another thing
13 Donna you keep writing talking about finding --" oh, yeah,
14 here, "-- finding you a younger nigga well is thats what you
15 really want? Because you sure have been throwing it in my
16 face an awfully lot of times ... an as far as the Robert plan
17 oh yes I meant it but it was you that wouldn't let me do it
18 ..." He's in trouble. He's what -- she talks about the
19 other guy. That's the jealousy angle. What's he do? He
20 gravitates back to, oh, the plan, yeah, but you wouldn't let
21 me do it. Was he out there? They could have done it in May,
22 June, July, August, any time. Did he do it? No. He didn't
23 want to do it. He was chicken. It was just bad talk or

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1 whatever, that's what it really boils down to, because he is
2 just a shyster. That's all he's ever been all his life.

3 This is 10/24/01, this is Donna writing back to him,

4 "I never once stopped you from doing anything about Robert.

5 Yes, you can do whatever you want to accomplish our goal.

6 But I really don't believe you want to do it. So there." He

7 didn't want to do it. Tough guy Nate. Oh, well, let's see.

8 Or the one thing I had -- this is the other plan,

9 this is where he's supposed to go in the station and shoot,

10 "... an let things get done an over with, because the next

11 lecture that you try to give me I'm just gonna change my

12 mind..." Back and forth, back and forth, back and forth.

13 Hey, if you're going to do something you do it, I don't care.

14 There's a lot of cheap talk in the world, you notice that?

15 But when it comes to did you ever really do it? No. Because

16 that's the way it goes. I don't care how many letters they

17 write or how many conversations they have.

18 And then finally, this is on 12/6, this is on 12/6.

19 He's within three days of coming out, this is the telephone

20 conversation, okay. You got the tapes in there, listen to

21 them. On 12/6, "You know, cause the way I got it planned out

22 man, you know what I'm saying, I mean I ain't gonna be in no

23 hood..." Okay. Well, he doesn't want the mask now. No, he

1 doesn't want the mask. What the hell would he get a mask
2 for? I mean, why would he have to be in a mask? In fact, if
3 he had a mask on and he is driving down Avalon Estate, that
4 nice place that the guy went, and he's running around, I
5 mean, who is going to say wait a second, whoa.

6 You know, if you think about this it's ridiculous
7 that he would go to a house, and he even says it. He says
8 you can kill anybody in Youngstown. But that's another
9 story.

10 Here's what he says. "... you know what I'm saying,
11 it's like, I want,".

12 "I don't think you really want to do that." That's
13 Donna.

14 "Huh. You don't want me to?"

15 "I just don't think you really want to have to do
16 that."

17 "Cause you don't want me to?"

18 "No."

19 "Ok then, well, like I was saying ..." Then the
20 plan goes on again. He's trying to back out and just say he
21 ain't going to do it but he doesn't want to do it the way
22 anybody else would say, Donna, I just don't want to do it,
23 because then she's going to turn around and say you don't

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1 love me, you don't do this, and that's the end of the ball
2 game, Donna leaves, because he has to please her, and that's
3 all it really boils down to. That's all it boils down to,
4 folks.

5 So what happens to the plan? Let's talk about that.
6 Okay. First off, well, not only -- the back and forth about
7 doing it and all that kind of stuff. Okay. All right.
8 Well, let's see. He gets out. The plan was they get to the
9 Wagon Wheel. We know they get to the Wagon Wheel. She goes
10 and gets that nice room. The prosecutor wants you to see, I
11 think he wanted you to see the nice jacuzzi and the nice room
12 and all the mirrors. It's all the sex and all that kind of
13 great stuff so that's supposed to, you're supposed to get
14 some idea built out of that. They had a sex room is what it
15 boils down to. That's why it's there and people use it. So
16 the Wagon Wheel is secured. He had his night of sex when he
17 comes home. She went and got him. The plan is okay.

18 The next night is when it's supposed to happen,
19 Monday night. What happens on Monday? What happens on
20 Monday? Nothing. Nothing happens on Monday. He promised he
21 was going to do it. I'm absolutely going to do it. I made
22 my mind up. I got this plan all worked out. They had to
23 have all the stuff by then. I want to do this. Did it

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1 happen? Nah. No.

2 And not only that, if we go back just a few days and

3 I said Donna Roberts says I don't think I should go to the

4 police about this Santiago guy or whatever, which I think it

5 probably would have been a good idea too not to go to the

6 police if you're really going to do something, okay. You'll

7 see in the phone conversations on 11/24, "Nate, he would come

8 here after work all the time and stand there for a half hour

9 and talk to me like a homeless person."

10 "Why don't you never call the police man?"

11 "Why didn't you, why didn't you never call the

12 police man?" Nate is saying call the police.

13 Nate, "Call and report that gun man. Man, call and

14 report this cat, man. You don't even know his whole name

15 ..." This is on -- what date did I say? She just keeps

16 talking about it. Okay.

17 "Call the police and report it ..." "Call the

18 police and report it man, because ..." That's all he's

19 doing. He's running through here screaming at her to go call

20 the police. Take the police with you when you go to pick him

21 up, don't you go. Call the policeman, call the policeman.

22 Nate is going to kill somebody supposedly, all right, and

23 he's going to have Donna go down to the prosecutor's office,

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1 file charges, have all the police come out and get involved
2 in all this and all of a sudden Robert Fingerhut ends up
3 dead. Now Nate Jackson wasn't going to do anything. He did
4 the simple thing that anybody would. The guy stole your gun,
5 he stole your money. Go call the police.

6 In fact, it's humorous in here. Some guy was
7 giving, I guess, Donna a bad time and he says file harassment
8 charges. Okay. He's kind of like more of a legal beagle
9 than any threat to anybody. But you'll see it in all these
10 conversations. So he did the opposite of what he was
11 supposed to do, got the police involved. And there was a
12 report and that's how they figured out who Santiago was. Of
13 course, Santiago was also the person that called up and told
14 Fingerhut everything.

15 It's in every one of the conversations, you'll see
16 it in about five or six telephone conversations, go call the
17 police, talk to them, do this, file charges. Go down to that
18 prosecutor's, do that. What's Robert -- isn't Robert going
19 to do anything about this? Sure doesn't sound like a plot of
20 murder.

21 Nothing happens on Monday. He was given a ride by
22 John Stamper. John Stamper came in and said he gave him a
23 ride on Monday to see a friend or something like that, okay,

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1 but nothing happens. Tuesday comes around. What happens on
2 Tuesday? Well, he wanted to stay out of sight and be cool
3 and lay low, so much that he ends up where? Remember? The
4 prosecutor told you in his final argument, he went down to
5 the Warren bus terminal and went next door and Donna took him
6 over there and got a hair cut at the Final Cut. Okay. That
7 was Chris Ellington, nice lady. Business, she wants to make
8 money, looks like she would be talented. So there's Nate at
9 the Warren terminal right next door at the Final Cut. He's
10 going to go kill somebody and nobody is supposed to know the
11 relationship between the two of them. Oh, that's ingenious.
12 He didn't kill anybody.

13 The next thing, in the afternoon, 5:15, kind of
14 cutting it close or whatever, okay, Nate may -- he was down
15 at that bus station terminal. There's tapes. You know,
16 that's kind of a strange animal. It only comes around every
17 one minute and people disappear, appear. It's so fuzzy it
18 can't see who is who and whatever. And it wasn't even
19 developed for the bus station itself, Greyhound, it was
20 developed for RTA, so he never even saw where the people were
21 that came in and out of the doors to go to the Greyhound, but
22 be that as it may.

23 So what happens? Jim McCoy comes down there, brings

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1 the bus down from Youngstown, gets there at 5:15. Actually
2 about 5:30 I think it was. He comes in and Nate comes out
3 and he knows now, he introduces himself as Nate. There he
4 is. Here I am. Here I am, Mr. Prosecutor, I'm at the Warren
5 terminal, I'm with Donna Roberts and here I am. Hello. And
6 Jim McCoy comes in and identifies him. It's evidence. What
7 happened to the plan? Got to lay low, get out of sight. No,
8 no. What happens next? They go out to eat. They go to
9 Red Lobster. Do they hide in the corner? Do they wear
10 masks? Was it Halloween? No. They went to a table.
11 Probably a hundred people in the place. They spent about an
12 hour there. They ate and they had a Long Island iced tea or
13 something like that or whatever. She remembers who he was,
14 comes in and identifies the photograph, this is the guy that
15 was with Donna Roberts. It's right at the Eastwood Mall. In
16 fact, it's only probably about a mile from where the
17 Fonderlac address is. Yeah, they followed the plan. Bull
18 crap, they didn't follow any plan. They weren't going to
19 carry it out. Nate wasn't going to carry that out. He
20 wasn't going to do it. He's chicken. But he had his sex,
21 she got him a hair cut. That's Nate, he's going to go along
22 with the flow. He ends up getting the Red Lobster meal, he
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1 gets that. Okay.

2 But what happens? Now we have Nate and we have
3 Robert Fingerhut, we've got the two. Robert Fingerhut, Nate
4 is home. What is Robert going to do? This can only get
5 worse. If she realizes and goes to an attorney or she
6 decides to just move Nate in there, or if she just says the
7 hell with Nate. She broke up with him twice in there in one
8 month supposedly, broke up with the guy, says we're finished,
9 we're finished. If we're finished is he going to go out and
10 try to kill somebody? I don't think so. I don't really
11 think so. I don't think that's going to happen.

12 Fingerhut has to do something about either Donna or
13 Nate. Nate is probably the most logical here. He meets him
14 down there, fine, says come on, I'll get you a job. That's a
15 good -- that's a good way to get him going, I'll get you a
16 job. Okay. Well, Nate probably thinks well, what the heck,
17 this isn't too bad, you know. I know this guy, I'm plotting,
18 saying all these bad things about him, but if he gets me a
19 job at the Greyhound station down in Warren, that's where
20 Donna works, I get some bucks and I'm there, too. That's
21 okay. I don't, I don't -- you know, what the heck, that's
22 okay, so he gets him to go with him.

23 Do they buy marijuana? I think so. Donna smoked

1 it. You saw it in the ashtrays and everything else. The
2 house was loaded with it. Robert smoked marijuana. So he
3 drives him to Warren. They don't go to the terminal and I
4 can't tell you, I can't tell you, I don't know. You're going
5 to have to figure it. I don't know what he had in mind. He
6 was nice to him on the way down and, as Nate said in his
7 statement, when they got to the house, when they got to the
8 house even Nate said the words that -- of course, Nate, you
9 know, he doesn't talk like anybody that I know. He really
10 doesn't. Yeah, man; oh, man, whatever. That kind of stuff.
11 But don't let that -- you figure out what's he's saying.

12 And the one thing he said that really struck me and
13 it made sense is he said he was like Dr. Jekyll and Mr. Hyde
14 because he got in there and he's talking about this job and
15 he gets him there and all of a sudden he says he was
16 disrespecting him. Well, the thing is that Robert was
17 turning on him and the reason that Robert is turning on him
18 is that -- I don't know what Robert was going to do. Maybe
19 he was just going to pull the gun out and threaten him. I
20 don't know what he was going to do. But as Robert kept
21 talking to this guy what he was looking at, he was looking at
22 Nate Jackson, who was the guy that could walk into that
23 house, he could marry Donna and move him right out of his

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1 house, move him right out of his business, move him right out
2 of his cars and move him out of the rental properties. He's
3 gone. Okay? He basically told

4 And maybe he just got, Fingerhut just got madder and
5 madder. You can see it in the letters how he erupts. And
6 whether he was just going to pull a gun to scare him -- he
7 carried a gun. He had a gun in his bag. Whether he had two
8 guns or not, I don't know. Well, I think he did. But he
9 carried it in the bag, he carried it in the Cincinnati Reds
10 jacket. After all, he was a special agent for the Department
11 of Justice. Bogus. But he had guns.

12 So Nate is in there, he gets Nate in there and pulls
13 a gun on Nate and he's going to do -- I don't know what he's
14 going to do. I don't know if he's going to threaten, say
15 "listen, buddy, I don't want you fooling around with my wife,
16 I want you out of here, whatever. I don't know if he wanted
17 to pay him off. God knows he had all the money, he could pay
18 him in cash, whatever he wanted to pay. He didn't show up
19 anywhere, he had her money. I don't know what happened. I
20 don't know whether he actually meant to shoot him, he was
21 going to kill Nate. I don't know. The point is when he
22 pulls the gun, the point is when he pulls the gun, okay, Nate
23 is not going to sit and wait to figure out gee, what are you

1 going to do, so they get in a struggle. Nate is going to try
2 to keep himself from getting shot, it's as simple as that.

3 What did Dr. Germaniuk tell you? He basically told
4 you that, these guys struggled. Both of them had injuries.
5 Take a look at the pictures of Nate. He's got banged up
6 legs, he's got other bruises. That, that was after, that's
7 on December 21st. Robert Fingerhut had the cut in the head,
8 or it could have been the gun going up against it or
9 whatever, okay. The men struggled. They both had blood on
10 them. They both had injuries. Okay. Both were shot,
11 Mr. Fingerhut, though, lethally. There's any number of
12 scenarios you can put together for how this happened. Okay.
13 Nate indicates when he pulled him down he was on top of him.
14 You pull to the side and you end up shooting, you shoot right
15 over the top, hit your own finger and shoot and hit him in
16 the head.

17 The problem is this, is if he's going to just kill
18 him or whatever, you're not -- he's just going to bang, bang,
19 bang. In fact, I don't like these things, but you open this
20 cylinder, whatever, let's go (pulls trigger three times.)
21 See, folks, it only takes that long to fire off three shots.
22 If you're in a fight with someone, if you're in a human
23 struggle with somebody and you're fighting with them, and

1 it's not a choreographed thing. This is not "The Practice"
2 or this is not stunt men doing it working everything out.
3 When it happens spontaneously how are you going to explain?
4 Well, but if you were there then you must have moved here and
5 you must have moved -- you don't do that. It happened in a
6 few seconds. That's all it would have taken. You can see
7 how fast the gun goes off. That's all that happened. How is
8 it exactly? No. Nate is trying to explain to the officers
9 and the officers go well, were you at this angle, were you at
10 that angle or this? The prosecutor goes whoa, there has to
11 be a hole in the floor. No, no, no, no.

12 You can put this all together, folks. If he's down
13 here and Nate is on the bottom and he's got a gun and they're
14 trying to struggle for it, if he has another gun and the gun
15 was right there, you can shoot right over top of the back and
16 he ended up shooting him in the head. It's as simple as
17 that. It's as simple as that. If he's laying right on top
18 that's exactly what happened. Nate isn't 220 pounds.
19 Mr. Fingerhut was. Okay. Forensics will tell you that. The
20 forensics in this will tell you that.

21 There was nitrate in the wounds, his hand. He had
22 nitrates on the glove. The blood. Look what happened. So
23 it happens. He doesn't know, that's why he can't figure --

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1 he doesn't even understand why it happened. He doesn't even
2 know. He doesn't even know now. He doesn't even know now.

3 But that's what happened.

4 So what does he do? Well, hey, as long as I'm here
5 I'll tell you what, murdered a guy, well, let's take some of
6 those gold bracelets and some of those gold necklaces and
7 some of the other stuff and let's empty his pockets out, for
8 God sake. He's loaded with money. Every pocket had money.

9 Every pocket had all kind of credit cards in it, phoney
10 badges, phoney identification. Robbed him? No. He takes

11 the keys, goes out and gets in the silver car and goes to
12 Youngstown, abandons it and calls Donna and says get me a
13 room. Whether he told her or not, I don't know what the
14 sequence.

15 They've got the Dobson records here from Dobson
16 Communications. I didn't realize, I got an Alltel bill and
17 they tell me that Alltel was bought out by Dobson but Alltel
18 still owns Dobson, so I don't know who is who. But, in any
19 event, they got the records. The problem is they're going to
20 give them to you, folks. Cell phone records, I don't -- you
21 know, they got them there but they don't have anybody to
22 interpret them for you. In a duration of time -- you know,
23 these guys were hurting for money so I don't know, as soon as

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1 you call and make a connection, you know, does the duration
2 of time go then? Even if you don't answer? It looks like
3 there's a bunch of calls in there, frantic calls, about 9:45,
4 it's like about half a minute, a minute, and it's right in
5 sequence within three or four minutes. Somebody is calling
6 somebody trying to get a hold of them. And later on you're
7 going to see some more time involved.

8 But you know what the interesting thing about it is?
9 You don't even know if these calls theoretically were
10 transferred. You don't even know if theoretically they have
11 a message service to receive the message or anything. We
12 don't know any of that stuff. That's okay.

13 Like I said, folks, the forensics bear all that out.
14 You have the gunshot residue and the tumbling, the tumbling
15 of the bullet in the wall. That hit something before it got
16 there. The tumble that hit the head, that hit something
17 before it got there. What it tells you is there's
18 confrontation, there's confrontation, whatever. One on one.
19 That's all it boils down to.

20 Did Robert Fingerhut have a reason to warrant it?
21 God, yeah, he did. Sure he did. Was he going to stand by
22 and let it happen? I doubt it, I really doubt it. Did he
23 know everything about Nate? Yeah, he knew everything about

1 Nate.

2 Poor Frank Reynolds out there. I don't know, I

THE 301 don't know -- of course, Robert didn't tell Nate what he was

4 going to pay him or anything, but he said go down to the

5 terminal or whatever. Frank Reynolds is out there, he works

6 14 hours and gets 35 bucks. And, of course, it's under the

7 table. You know, that's the interesting thing about

THE 801 Mr. Fingerhut. I don't know the answer to all of what he

THE 901 does. I know people do this a little bit and this a little

THE 1001 bit, whatever, but everything, you know. He's Mr. Roberts to

THE 1101 the Preston Auto dealership for five years. I don't

THE 1201 understand that. He's the man who didn't want to exist and

13 there has to be something more to it.

14 Remember Gerardi, they had blood on each other. The

15 blood, they had a mixture of blood, and she got it from the

16 visor of the silver car. It was a mixture of Robert

17 Fingerhut's and Nate Jackson's. They were in close

18 proximity. They were touching it each. They got blood on

19 it. That's what you have.

20 Listen, you people have been really good. I thank

21 you for your attention. I know you'll do a good job with

22 this. You don't have to do anything that anybody tells you

23 to do. Do the best you can with it. Anthony is going to

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1 stand up here, he won't be as long as I was, so you're going
2 to smile and thank God for that. Okay. Thanks very much.

3 THE COURT: Thank you, Mr. Lewis. Does
4 the State wish to have the last word? Oh, you're going to
5 have ---

6 MR. WATKINS: Are we going to take a
7 break, Your Honor?

8 MR. CONSOLDANE: Yeah. You want a break?

9 THE COURT: Oh, okay. I'm sorry. I
10 thought Jim was doing the whole thing.

11 MR. MORROW: Take a five minute break?

12 JUROR: Your Honor, how long is our break?

13 How long is our break, please?

14 THE COURT: You want a break?

15 JUROR: Please.

16 THE COURT: Yeah, okay. That's fine.

17 MR. CONSOLDANE: Five minutes.

18 THE COURT: Take 10 minutes.

19 MR. CONSOLDANE: Ten.

20 (Whereupon, a brief recess was taken,

21 after which the following proceedings occurred outside the

22 presence of the jury.)

23 THE COURT: On the record, I am going to

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1 give the oath to the officers of the jury that will be
2 sequestered in this matter. Some of them have to get out of
3 here early so when they come in this evening they will have
4 been sworn. If you all will raise your right hand?

5 (Whereupon, the oath was given to Officer
6 Adrienne Bradley, Officer Dario Poledica, Officer Jolene
7 Marcello and Officer LaJuane Freeman.

8 THE COURT: Let me say one thing in
9 addition to that. If anything comes up to their comfort you
10 should pass that on to the bailiff and you know what to do.

11 Okay.

12 (Whereupon, a brief recess was taken,
13 after which the following proceedings commenced in open
14 court.)

15 MR. CONSOLDANE: Your Honor.

16 THE COURT: Just one moment.

17 MR. CONSOLDANE: Oh, I'm sorry.

18 THE COURT: We have one alternate here.

19 MR. CONSOLDANE: Are we all here now?

20 THE COURT: Yeah, we're all here now.

21 Okay, Mr. Consoldane.

22 **FINAL ARGUMENT CONTINUED ON BEHALF OF THE DEFENDANT**

23 MR. CONSOLDANE: Okay. Thank you. Your

1 Honor, Mr. Lewis, Mr. Jackson, Mr. Watkins, Mr. Morrow,
2 Mr. Monroe. Good afternoon, ladies and gentlemen. I tell
3 you one thing, that I always am short and I won't be -- 15,
4 20 minutes, you won't have to put up with me any longer than
5 that. I feel if you can't say what you got to say in that
6 period of time it doesn't deserve to be said.

7 Three points real quick. One is that Mr. Watkins
8 was saying about, you know, talking about everything I said
9 on opening. Well, the judge has told you at the beginning
10 that what I say on opening is not evidence. You know, why he
11 talked so long about what I said on my opening remarks and he
12 avoided talking about the evidence. Talk about a diversion,
13 that's a diversion, trying to talk about what I said.

14 And, second of all, they talked about some
15 marijuana. If you'll look through the pictures in the
16 evidence there is a picture of marijuana and rolling paper on
17 the table, and I'm not sure -- it's at the crime scene and I
18 don't remember whether Dr. Germaniuk took them or one of the
19 police officers, but it's in there and you will be able to
20 see the marijuana is sitting on the table.

21 And the other thing is that Mr. Watkins said about
22 children, they say it's their home. Well, naturally it's
23 their home. They can't sell it, though, and they can't go

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1 borrow money against it, but it is their home. And actually
2 children stand a better chance of inheriting their home from
3 their parents than ex-wives or ex-husbands do. So, you know,
4 to say that was his home, he was living there but that was
5 not his home.

6 And then the last point that I wanted to bring up to
7 you about was that the scene had been altered by the time
8 that Jim and I and our investigator got to take a look at it.
9 It was entirely different than it was when Mr. Monroe found
10 it so we really can't tell you how many shots were fired. We
11 didn't get a chance to look. We know that Robert Fingerhut
12 was shot three times. There was one that grazed him on the
13 back -- one that went through his back, one that grazed him
14 on the back and one that went through the head. And we know
15 that Nathaniel Jackson got shot in the left finger and we
16 also know, you heard the evidence, that Nate is left handed.
17 Okay.

18 During the second world war at the beginning of the
19 war we had probably the best bombers in the world. They flew
20 high and were able to pretty much bomb at will, and they had
21 tail gunners, turret gunners and they a lot of times had
22 fighters to escort them. But around towards the middle or
23 the end of the second world war the axis powers developed

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1 anti-aircraft guns that were able to hit these planes, they
2 were able to travel high enough to hit the planes, and these
3 bombers couldn't take any evasive action, they were too big
4 for that, and a lot of them got hit by anti-aircraft fire.

5 Well, when this happened and they came back they had
6 an engineer down. When every plane landed he had a chart of
7 the plane and he would mark everywhere on that plane that it
8 was hit. And after he collected all of his data the general
9 that was in charge of that wing had them all come in for a
10 meeting and this engineer, they had another engineer, to
11 discuss where maybe they could fortify these airplanes
12 without ruining the integrity of the airplane. And there was
13 this colonel in the back of the room, he had his feet up and
14 he was sleeping and he was older. As a matter of fact, he
15 probably would have been retired from the Air Force had it
16 not been war had broke out. And the general went up to him
17 and woke him up and he said, "Aren't you interested in this?
18 You know, we're trying to see if we can fix these airplanes."
19 And he said, "To be quite honest with you, general," he says,
20 "I'm not very much interested. I would be more interested in
21 knowing where the planes got hit that never made it back."
22 And in this particular case I think it's a lot more important
23 to know what they didn't prove as to what they did prove.

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1 When you go back -- well, no. Strike that. I'll
2 talk about this first. They're going to talk to you about
3 aggravated burglary first. That's what they had asked to
4 have the judge instruct you about and so it would flow easier
5 rather than talking about the murder first. The aggravated
6 burglary, Mr. Monroe right there on the stand, no sign of
7 forced entry. No signs of forced entry. One of the elements
8 in burglary is you have to show that they entered the house
9 by force, stealth or deception. They want you to infer how
10 he got into the house, but there was no proof from the stand
11 as to how he got into the house. They played a tape that
12 said that Fingerhut invited him. They kind of said that
13 maybe Nate and Donna kind of planned this and he got in there
14 some other way, but there was no evidence to show how he got
15 into the house.

16 And remember when we were talking earlier on voir
17 dire about the cake, about all the elements you need? You
18 need, you need that. If that's not there it's not a cake.
19 It's not aggravated burglary.

20 Same thing moves as you come down to aggravated
21 robbery. It has to be a theft offense. Exert control over
22 property with the purpose to deprive the owner. If you --
23 well, look, this is joint exhibit, it's going to go back to

1 you. Go back there and take a look at these things. A
2 watch, gold jewelry, there's diamonds in it, the star of
3 David. I don't know, it seems to me there's got to be a good
4 quarter pound of gold in here. This is going to go back, and
5 a lot of you know more about jewelry than I do. Nothing was
6 taken. That was all found there. Not only that, all of the
7 money in his wallet was still there. Aggravated robbery? I
8 don't think so.

9 They're going to say, well, he took the keys to the
10 car. Might have. Bunch of keys there. Probably keys to the
11 Warren bus station, keys to the Youngstown bus station, keys
12 to the house, keys to the other car, maybe even some keys to
13 the rental property, all owned by Donna Roberts. Everything
14 was owned in Donna Roberts' name. They have to prove
15 ownership. They have to prove that Nathaniel Jackson took
16 something, exerted control over something against the will of
17 the owner of it. He had to deprive the owner. There is no
18 proof to that.

19 I'm going to try to make this a little bit easy for
20 you, is that when you go back into the jury room along with
21 instructions you're going to be sent with a lot of jury
22 verdict forms. Count 1 is the aggravated murder with prior
23 calculation and design. Premeditated murder. Okay. That

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1 you are going to have to consider. The next two specs, you
2 got a spec of aggravated robbery, a spec of aggravated
3 burglary, forget about them. That doesn't apply.

4 Along with count one you're going to have a lesser
5 included offense of murder, you've got to consider that, and
6 also a lesser included offense of manslaughter. The reason
7 that you're going to have to consider those other charges is
8 because the tape that the prosecution played and the Court
9 ruled was competent evidence, was allowed to be played in
10 this courtroom, that indicates that Nathaniel Jackson, at
11 least at one time, had a self-defense. He was trying to
12 protect himself and that's when he got shot. Now, if you
13 don't believe the self-defense then you can move up the
14 ladder to either manslaughter or murder or even to aggravated
15 murder. These three verdict forms do need your concern.

16 Then we move on to count two, aggravated murder. We
17 only have one murder. Only one person was shot. This is a
18 felony murder. You don't have to consider that. This is the
19 specs, one and two. This is also with the robbery and the
20 burglary. This is what supports count two. You don't have
21 to worry about those either.

22 MR. WATKINS: Your Honor, I'm going to
23 object.

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1 MR. CONSOLDANE: I would, too. I'm just
2 telling them the way it is, Dennis.

3 MR. WATKINS: I objected once and now I'm
4 just objecting.

5 THE COURT: Well, your objection is noted.
6 Overruled. This is argument. The Court has repeatedly told
7 the jury you must follow my instructions of law, okay?

8 MR. CONSOLDANE: What I'm saying, I'm just
9 trying to make it easy for you. You get back there, forget
10 about the rest of these. These are the three you have to
11 concern, and this actually is very serious. You've got
12 aggravated murder, premeditated murder. You know, there's
13 enough evidence that really you should consider that.
14 There's also murder and there's also manslaughter, and then
15 at the end we've got self-defense. As far as the burglary
16 and the robbery goes, don't waste your time. The evidence
17 isn't there.

18 You know, I know they would like to have you believe
19 that evidence is there and they're trying to actually even
20 get you to think by circumstantial evidence that they can
21 somehow or another have you infer that the burglary or the
22 robbery occurred. On -- as you remember on voir dire, I
23 talked a lot about circumstantial evidence, told you a little

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1 story about the dog and the blueberry pie, and, you know,
2 there's another story I have that really kind of explains the
3 circumstantial evidence.

4 If you have a box and inside that box you put a
5 little tiny mouse and put a cat in that box and you close
6 that box up. When you come back after an hour and you open
7 the box up and pull the cat out and it's got a big Cheshire
8 grin on its face and you look down inside there and there's
9 no mouse, that's pretty good circumstantial evidence that the
10 cat ate the mouse.

11 However, if you pull that same experiment and you
12 put the mouse in the box, put the cat in there, tie it up.
13 Come back in an hour and you pick up the box, open it up and
14 take the cat out, and you look inside and there's no mouse,
15 but you pick that box up and you hold it to the light and you
16 see a tiny little mouse-size hole. That, ladies and
17 gentlemen, is reasonable doubt, and this case has several
18 little mouse holes.

19 If we -- if you look at it, there is the Nate is
20 left handed, got shot in his left finger. There was two
21 guns. The gun they found had never been shot. There was
22 nothing taken. And, you know, they, they -- they're going to
23 tell you a lot of reasons and they're going to have the --

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1 want the judge to tell you the instructions that once you
2 enter upon a property, that if you have some evil, sinister
3 thing in mind then your right to be on the property
4 terminates, and this is all things that they want you to try
5 and figure out what was in the mind of Nathaniel Jackson.

6 There's no doubt that he wrote letters back and
7 forth to Donna Roberts and he promised her a lot of things in
8 those letters. He really wanted king crab legs when he got
9 out and sex and a bottle of brandy. You know, he would
10 probably say anything. He had been locked up for a year,
11 nine months. You don't know what was in his mind when he
12 first walked into that house. They want you to infer that
13 something was in his mind, but we really don't know, and we
14 don't know who made the first move. These are all mouse
15 holes. These are all things that bring up reasonable doubt.

16 You are going to have to use your common sense. The
17 judge is going to tell you what the law is, but you can only
18 apply it. You're the only ones that are allowed to apply
19 that law to what evidence has been brought in this case. And
20 I, I think that if you look at it clearly that you'll see
21 that these three verdict forms are the only ones that you
22 should really have to consider.

23 You know, this is -- I'm going to have to sit down

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1 now. This is probably the last thing I'll be able to say,
2 and I don't think I went too much past the 15, 20 minutes.
3 If I did, I apologize for it. But it's been very nice
4 talking with all of you, and if I have said anything that has
5 offended you, you know, please don't take it out against
6 Nate.

7 And one last thing, I asked you all one question
8 before you were on the jury, is that would you be satisfied
9 to have someone such as yourself sit on a jury, you know, in
10 this case and you all said yes, and I really hope that you
11 can be as fair as you can to Nathaniel Jackson. Thank you.

12 THE COURT: Thank you, Mr. Consoldane.
13 Mr. Morrow, you have the last word.

14 REBUTTAL ARGUMENT ON BEHALF OF THE STATE OF OHIO

15 MR. MORROW: Thank you, Your Honor. We
16 sit here at 3:00 o'clock in the afternoon on Wednesday of a
17 case that was supposed to be done by last Thursday. One
18 thing Mr. Watkins and I want to thank all of you for is your
19 time. That is the one thing you've given to us that we
20 cannot return to you, but again, it is something that is very
21 important, that each and every one of you be here and to give
22 us your time so that justice is done in this case.

23 Everyone in terms of the defense has danced around

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1 the scenario and danced around what happened at 254 Fonderlac
2 on December 11th, 2001. Ladies and gentlemen of the jury, it
3 is Mr. Watkins' position and mine that quite simply what
4 happened is that that man, Nathaniel Jackson, and Donna
5 Roberts plotted the murder of Robert Fingerhut over the
6 course of about nine months. We have the letters going back
7 to February where they begin talking about putting together a
8 plan to take care of the situation.

9 What happened? Well, I don't know for certain, but
10 I think what the evidence is going to disclose is here is
11 what happened. This man and Donna Roberts plotted the murder
12 and what their plan was was to go to the house and when
13 Robert Fingerhut got home pull a gun on Robert Fingerhut,
14 handcuff him and forcibly take him from the house at 254
15 Fonderlac, take him down to Youngstown and execute him in
16 Youngstown and leave the car there. That was the plan. Then
17 after they were done, had finished executing him--

18 MR. CONSOLDANE: Your Honor, I'm going to
19 object. There is no evidence of that plan.

20 MR. MORROW: This is my -- this is what we
21 believe the evidence will show.

22 THE COURT: Yeah.

23 MR. MORROW: Or what we believe the

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1 evidence --

2 THE COURT: Objection noted and overruled.

3 Okay. Is he do?

4 MR. MORROW: What we believe the evidence

5 in this case suggests was going to happen. Unfortunately, --

6 oh, and then after they were concluded with their plan of

7 murdering Robert Fingerhut they were going to dispose of the

8 letters that were found in the dresser and they were going to

9 dispose of the letters that were found in Donna Roberts' car.

10 But guess what? The best laid plans of men and

11 hunters or men and mice went astray. And how did that plan

12 go astray? Why did it go astray? Because when Robert

13 Fingerhut saw this man armed with a gun he had no choice but

14 to defend himself and to try to attack him. And what

15 happened? He got smacked in the forehead. You know, I may

16 even be mistaken here. He may have actually shot him in the

17 back first and that's when Robert Fingerhut turned and

18 realized it was him. And what does Robert Fingerhut do? He

19 starts to go down, and that's why the second shot comes

20 across his back. And where is the third shot? The third

21 shot is when Robert Fingerhut is on the ground beside the

22 counter. And where is that shot? It is through his hand

23 into the top of his head from the garage.

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1 Now, ladies and gentlemen, the best laid plans go
2 wrong. What happened? At some point during this Nathaniel
3 Jackson does one thing. What does he do? Shoots himself in
4 the finger. Now, imagine if you're there and you have these
5 plans and you shoot yourself in the finger. What happens?
6 You lose sight of what you want to do. You lose track of
7 what your plan was going to be. And not only that, instead
8 of executing him in his car in Youngstown he ends up killing
9 him in the house. Shots go off. Neighbors could hear them.
10 What kinds of things start going through your mind? He
11 panicked. That's what happens.

12 And how do we know this? Because the phone records
13 that you are going to see are going to show that around 9:45
14 there are phone calls made between Donna Roberts' car phone
15 and the cell phone that he was using. And what else do we
16 have confirming that takes place? We have Donna Roberts all
17 of a sudden driving incredibly slowly on Old Route 82. And
18 why is she driving slowly? Because she's on the phone and
19 this man is saying I'm shot, what are we going to do? She
20 drives down Old 82 slower than what people believe she should
21 be driving. She stopped at a light for longer than she
22 should be there because they're trying to figure out what to
23 do. Ladies and gentlemen, the best laid plans, the plans for

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1 this man to take Robert Fingerhut out of his house and
2 execute him, went wrong because he shot himself in the left
3 finger. That's the bullet that tumbles through and hits the
4 wall, ladies and gentlemen.

5 Now, one of the things that Mr. Lewis tells you is
6 he says don't take his words for what happens. That's right.
7 Let's take the defendant's words and Donna Roberts' words and
8 we're going to find out what really happened. But before I
9 do that I want to talk about a couple of things that they
10 want to suggest to you is what's going on.

11 Mr. Consoldane tells you you only have to consider
12 three charges? You know, actually the judge is going to read
13 you an instruction that tells you the only way that you
14 consider involuntary manslaughter and that you consider
15 murder is if we are unable to prove that this man purposely,
16 with prior calculation and design, killed Robert Fingerhut.
17 And his words, ladies and gentlemen, are going to prove that
18 he planned the murder and executed the murder.

19 Mr. Consoldane wants to talk to you about ownership
20 of the house and trespass and occupied structure. Ladies and
21 gentlemen, you are going to have these instructions back in
22 the jury room with you. Trespass. Trespass means knowingly
23 entering the land or premises of another without privilege to

1 do so. Any entrance or remaining in knowingly made in a
2 structure of another that is unlawful if it is without
3 authority, consent or privilege to do so.

4 Where a defendant lawfully enters a residential
5 premises, the privilege to be in or upon this premises can be
6 inferred to have been revoked where the defendant thereafter
7 commits a violent felony directed against another person in
8 the premises who had ability and authority to revoke the
9 privilege.

10 When one enters upon the property of another as an
11 invitee or licensee, that person loses his status as an
12 invitee or licensee and becomes a trespasser when it becomes
13 evident that the purpose of such entry is to commit a
14 criminal offense.

15 Ladies and gentlemen, the purpose of his entry,
16 which is going to be detailed in all of his letters and his
17 phone conversations, was to kill Robert Fingerhut. That, in
18 essence, equals a trespass, and that is the burglary of going
19 into the place.

20 Occupied structure. Occupied structure means any
21 house, building or other structure which is maintained as a
22 permanent or temporary dwelling. It doesn't matter whether
23 Donna Roberts was the titled owner or not. Think about it in

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1 this context; applying the defendant's logic, a renter, a
2 person who was renting an apartment from somebody, could
3 never have a burglary committed against them. Why? Because
4 they're not the titled owner, right? That's the whole thing
5 of what a renter is.

6 MR. LEWIS: No, that's not --

7 MR. CONSOLDANE: We never said that, Your
8 Honor. Objection. We never talked about renters and that's
9 a bad analogy.

10 THE COURT: Your objection is noted.

11 Overruled. Okay. Let's go on.

12 MR. MORROW: Thank you, Your Honor. In

13 other words, they are trying to tell you that since Robert
14 Fingerhut wasn't the titled owner of the house, wasn't the
15 titled owner of the car, he has no interest in the house and
16 he had no interest in that car. Ladies and gentlemen, your
17 common sense tells you that's wrong independently.

18 An owner means any person, other than the actor, who
19 is the owner of or who has possession or control of, or any
20 licensee or interest in property or services, even if such
21 ownership, control, license or interest is unlawful. In
22 other words, a thief can steal from a thief, that is an adage
23 of law, meaning that if you have a possessory right to be in

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1 property, have a possessory right to hold that property, you
2 are the owner of it. Therefore, a renter is an owner. I
3 give my car keys to my next-door neighbor and say drive my
4 car. For purposes of law, my next-door neighbor is an owner.
5 Think about the logic of their argument. There isn't any.

6 Mr. Consoldane also wants to tell you that Robert
7 Fingerhut wasn't robbed because all his jewelry, all of these
8 fine things weren't taken from him. Well, you know what,
9 ladies and gentlemen, these were. The keys were taken from
10 Robert Fingerhut when the defendant left the house. And you
11 know what? Carmen, I forgot his name, and Barry both told
12 you without a doubt these were Mr. Fingerhut's keys.
13 Actually they were Mr. Roberts' keys, as he called him, but
14 they were Mr. Fingerhut's keys. Secondly, use your common
15 sense. How many women carry a gym bag, a buoy eyeball, a
16 finger knife? Quite simply, ladies and gentlemen, these were
17 Mr. Fingerhut's keys and he took them.

18 Go to the car, and you're going to have pictures in
19 the back of the car. What was in the back of the car?
20 Mr. Fingerhut's clothing. Mr. Fingerhut's jacket.
21 Mr. Fingerhut's personal items. And he took his car. When
22 took Mr. Fingerhut's car, the car that Mr. Fingerhut drove,
23 and he took his personal items, that also constitutes a

1 robbery. Ladies and gentlemen, property means any property,
2 real or personal, tangible or intangible, or any interest or
3 license in such property. It doesn't have to be a \$33,000
4 car, it can be as simple as these keys.

5 I would concede, as Dennis and I have done already,
6 that Donna Roberts was the titled owner of all the business
7 property; Donna Roberts was the titled owner of the house;
8 Donna Roberts was the titled owner of the car. Interestingly
9 enough, he's right, she could have taken everything and
10 booted Robert out. But what's the one thing she couldn't get
11 while he was still alive? What's the one thing? Actually,
12 ladies and gentlemen, it's 550,000 things. \$550,000 for
13 Robert Fingerhut's death, that's what she gets, and, as a
14 result, that's what he gets. That's the one thing she
15 couldn't get. And you know why she needed that? Because her
16 business was in trouble. And you know why the business was
17 in trouble? Remember when this happened, three months after
18 September 11th. How many of you traveled after September
19 11th? How many of you decided to stay home and not go
20 anywhere after September 11th? That's what was going on.
21 And you're going to hear that the business -- I'm going to
22 read a letter that says the business lost \$19,000 because
23 nobody was traveling.

1 She was cut off. Dennis read you the letter about
2 the 52 credit cards. She was cut off. She had no money.
3 THE COURT: Why? Because Robert was giving it to her all. So she's got
4 to kill Robert to get the \$550,000. Mr. Lewis suggests, you
5 know, Donna could have kicked him out. Donna could have
6 said, "Robert, leave." Donna could have said, "Robert, get
7 out of here." Yeah, she could have, but did she? No. We're
8 not talking about hypotheticals, ladies and gentlemen, we're
9 talking about what was going on at the time of the murder,
10 and at the time of the murder Robert Fingerhut was worth
11 \$550,000 to her dead.

12 Also, it's interesting, there's two phrases, de
13 facto and de jure. They are two terms used in law. De facto
14 means in fact. De jure means in law. Well, Donna Roberts
15 was the de jure owner; in law she was the owner. But the
16 evidence I submit to you suggests that Robert Fingerhut was
17 the de facto owner.

18 MR. CONSOLDANE: I object, Your Honor. He
19 can't argue against his own evidence.

20 THE COURT: I don't believe that he is.

21 MR. CONSOLDANE: Well, I mean, the
22 evidence, he can't --

23 THE COURT: Overruled. Overruled.

1 MR. CONSOLDANE: And besides, it's up to
2 you to inform them what the law is, not the prosecutor.

3 THE COURT: Okay.

4 MR. CONSOLDANE: And that's not in the
5 jury instructions.

6 THE COURT: Overruled. You are on the
7 record, your objection is noted.

8 MR. MORROW: Thank you, Your Honor. In
9 reality Robert Fingerhut, even as Mr. Lewis tells you, ran
10 the business, ran the house, controlled the money, did all
11 that stuff, and maybe Donna didn't know the law in Ohio.
12 Maybe she didn't. Maybe she thought there was a common law
13 marriage because they were from Florida. We don't know that.
14 But we do know she wanted him dead.

15 Mr. Lewis suggests that Robert Fingerhut knew about
16 Nate Jackson. I would submit to you that Robert Fingerhut
17 knew about someone, he didn't know about Nate Jackson. As a
18 matter of fact, when you have the letter from Donna Roberts
19 which is dated November 26th at 1:00 p.m., you're going to
20 read this letter, and it is says "I only worry about losing
21 you or losing me to incarceration. You know I will be the
22 first one to face questioning. I don't want to have to get
23 an attorney and defend myself. Oh and I have some info to

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1 add to our plan. You know there are phone records and CCA
2 pass records. Well - everyone thinks he is gay - did you
3 know that? It's been whispered alot in Youngstown. The good
4 part is that he is the one who wrote and paid the checks on
5 the phone bills - his writing. So - he knew about you." The
6 nice thing, though, you're going to see this, parentheses,
7 "(not really) But the whole phone thing could be good
8 because it shows you were a friend to both of us. And maybe
9 you were a real good friend of his. Anyway, your hair and
10 prints could be anywhere since you drove the car and were
11 here and all. But I think it's all gonna come down to me
12 when I get that call. And I can handle that because it means
13 everything to us both. I am not even worried about it any
14 longer because I've thought about it alot and am prepared.
15 Instead of laughing and cheering, I will concentrate on
16 losing someone that I ... really get nuts over and react
17 accordingly."

18 You're also going to see letters, and Dennis has
19 read a couple of those to you already, that talk about how
20 she hid the letters from him. October 20th, page two, I know
21 but I keep forgetting. And in every letter that you mention
22 anything about Robert, well, I think you better throw them
23 out and maybe you should do the same with mine."

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1 Donna, November 9th, 11:00 o'clock, "He walked right
2 in again to check up on me. Man I threw your letter and this
3 letter under the desk so fast." "I ... can't believe ... he
4 hasn't put this together yet ..."

5 That November 26th letter I forgot, I forgot this
6 "... I have been all over looking for a ski mask. I only
7 see ... knitted caps. Any suggestions on who might have
8 them? And I'm still looking for gloves because I don't think
9 the thick ones I'm seeing are good to work with as ...
10 thinner leather ones. Know what I mean?"

11 Oh, just as an aside, Mr. Lewis talked about him not
12 wearing a hood. No, Mr. Lewis is confused. The hood he is
13 talking about is the hood, the neighborhood, the slang for
14 the neighborhood that the defendant lives in, not that he's
15 not going to wear a hood. Read through his letters when he
16 talks about I ain't going back to the hood. What he's saying
17 is I'm not going back to the ghetto. Why? Because he's sick
18 and tired of living in the ghetto. And what's his way out of
19 the ghetto? Killing Robert Fingerhut.

20 Mr. Lewis talks about a bunch of different plans and
21 he talks about keeping the letters and he talks about the
22 phone calls. Well, unfortunately we are probably all too
23 familiar with stupid criminals in the news. I don't submit

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1 any criminal is a smart criminal. I think they're all pretty
2 stupid. But you know what, when you kill somebody that's
3 probably the biggest form of stupidity that you can show.
4 And, you know, the fact that they didn't dispose of the
5 letters in a timely fashion and the fact that they were
6 recorded on phone conversations doesn't mean somebody didn't
7 murder Robert Fingerhut. The fact that he was not smart in
8 their plan, or not smart in carrying out the plan is the way
9 they had it figured out, doesn't mean it didn't happen. This
10 wanna-be over here wanted to be a tough guy and he wanted to
11 kill Robert Fingerhut and he did.

12 Please bear with me for just a few moments. I want
13 to read just a couple more excerpts from the phone
14 conversations, or from phone conversations and letters.
15 You're going to have them all back there. Two hundred and
16 eighty-eight letters. Actually 283, I believe, total
17 letters. But, ladies and gentlemen, they're right, we are
18 picking out the ones that show the plan because, having read
19 through every single one of those and having her talk about
20 performing oral sex on him or using different kind of toys or
21 different kinds of sexual activities, I don't think it's
22 necessary for you to read through all that stuff. It's up to
23 you.

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1 MR. LEWIS: Objection, Your Honor. He's
2 telling them not to look at the evidence. Now, that's
3 ridiculous. He can't do that.

4 THE COURT: He is giving his opinion. The
5 jury has the right, of course, to read through every last
6 letter if they wish to. He is merely giving his opinion.
7 Objection noted. Overruled.

8 MR. MORROW: Thank you, Your Honor. And
9 to begin with I just want to talk a little about the money
10 issue. The October 20th letter, 2001, 11:00 o'clock, "I hate
11 it when he talks to me too. I hate to look at him. And I
12 get sick when he is about to come home at night. I wonder
13 what's going to happen in our house." She even tells you
14 folks that it's their house, hers and Robert's. "This
15 certainly is no way to live. I can't stand to ... handle ...
16 his laundry anymore." "If there was any way I could leave
17 and just live half as well as I do - I would leave that house
18 right now." Ladies and gentlemen, she thinks the only way
19 out is to kill him.

20 December 20th again at 1:00 o'clock, "It'll just be
21 a little tougher now because he gives me \$100 a week for
22 everything and then makes me write checks to keep track of it
23 all. And I haven't been allowed to use any of my 52 charge

1 cards - emergency only." This is what Dennis read to you and
2 this is what Mr. Lewis read to you. Do you know what that
3 means? She's got no money.

4 October 29th, "... as far as the Robert problem?
5 Yes I'm taking care of that the next night ..." this is from
6 Nate to her, "... because I told you I'm tired of living like
7 this when I don't have to. An after that will you get me a
8 2002 Cadillac Deville?"

9 Donna, November 2nd, "... I don't want you to feel
10 insecure so you can rest assured that I will always look out
11 for your best interest. I will always make sure that if
12 anything happens to me - well - you'll be taken care of. You
13 know I have already begun to think about that aspect of our
14 relationship."

15 "Maybe you want to eliminate me too, get your
16 inheritance and be gone with your young girlfriend!"
17 Inheritance issues there. She's already contemplating that
18 she's going to get Robert's inheritance when he dies and
19 that's why she puts it in. She is going to take care of him.

20 November 10th from Donna, "Guess what - I have no
21 money and no weed as of right now. \$6.00 that's all I got!
22 I am used to having at least a couple of hundred on me ... I
23 sure miss that. I have got to figure a way to get some money

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1 before you get home! That's for sure. He has me on a real
2 short rope here. He watches me every fucking minute." "He
3 examines every check I write. I HAVE TO ASK PERMISSION TO
4 USE A CREDIT CARD OR WRITE A FUCKING CHECK! What the fuck is
5 that all about!"

6 Finally, November 20th, "... just got the word from
7 Y-town. We're \$19,000.00 down in business there which
8 translates to \$2470 for us at 15%. So you see how bad it is
9 and I forgot how far down we are ... in Warren. I don't
10 think its as bad as Y-town but we are down alot too. That's
11 alot for a month you know."

12 I just got -- the defense also wants to suggest,
13 first Mr. Lewis suggests there's only one gun and
14 Mr. Consoldane wants to suggest there's two guns. Actually,
15 ladies and gentlemen, I'm going to tell you that Donna
16 Roberts by her own admission tells you she had three guns
17 prior to one being stolen. We are down to two. And what two
18 guns do we have left? Well, for sure we know this one. This
19 is Robert Fingerhut's Taurus. This is the gun that's found
20 at the crime scene on the step. This is the gun that was not
21 used to kill Robert Fingerhut. This was the one that had all
22 five spent or all five shells left in it. We clearly know
23 that Robert, that this gun was not used to kill Robert.

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1 Donna, by her own statement, tells us that she has
2 guns. November 24th telephone conversation; remember, we
3 played this the other day where she talks about the guns
4 getting stolen. "Donna: It's a big 38." Nate, "The big
5 one."

6 "Donna: Yeah. I had, I had both of them in there.
7 That little one you know, and that, and for some reason I
8 took the little one and put it in the bedroom by me because I
9 heard a noise one night ..."

10 Nate, "Yeah."

11 "Donna: Or they ... both ..." would have "...been
12 gone."

13 Nate, "So you still got two of them don't you?"

14 "Donna: Yes."

15 Donna's letter November 26th, "... I have my .38
16 Taurus right here by my right hand..."

17 Donna's November 27th letter, "This .38 Taurus looks
18 like a piece of junk compared to it. Wait ... just ...
19 another ... look at it - it's not ..." all that bad. "But
20 it's not my favorite S and W," which I believe is Smith &
21 Wesson. "I wonder where I can get another one like it. Or
22 maybe two guns are enough."

23 Also the defense raises some suggestion that Robert

1 was smoking marijuana or that this defendant's story is
2 correct because he and Robert went to C. Staples to get the
3 marijuana. Two pieces of evidence I want you to remember,
4 the toxicology report from Dr. Germaniuk who testified that
5 Robert Fingerhut had not a single drug in his system. That's
6 a toxicology report taken from a dead man. Second, remember
7 this officer's testimony. The roaches that were found in the
8 house had pink lipstick on them. You draw the conclusion you
9 want. And I guess maybe third, think about the letter I just
10 read to you when Donna is telling you she didn't have weed.
11 I would suggest it wasn't Robert that smoked the weed but it
12 was Donna.

13 You are going to have the letters back there with
14 you, ladies and gentlemen. There is -- Dennis went through
15 15 letters detailing this plan and there are more letters
16 that you're going to have. And indeed, if you remember the
17 one that Dennis read to you, it was where they talked about
18 having Robert watch while Donna performs oral sex on this
19 man. If you remember what that letter talked about it talked
20 about that he is going to be tied up and there isn't anything
21 he can do about it, or words to that effect. How is that
22 going to happen? It was going to happen because they were
23 going to handcuff him, and that was before he was going to,

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1 quote, leave planet earth, if you remember.

2 Not only did we have this conversation about her

3 having Donna initiating the idea about having Robert

4 perform on her, we have this defendant confirming it in his

5 letter and we have this defendant confirming it in his spoken

6 words.

7 As you go through the letters you're going to hear,

8 you're going to read things that initially may not make sense

9 to you, and I'll submit to you that once you get done reading

10 the letters everything will start to come into place. And in

11 those are terms like situation, package and delivery. I

12 suggest that the letters explain that the situation was the

13 Robert situation, the delivery and the package was making his

14 initial plan of killing Robert at the Greyhound bus terminal,

15 only he decided maybe the better thing to do was to do it at

16 the house because they were going to be able to take him down

17 to Youngstown and dump him. You're going to see that, ladies

18 and gentlemen.

19 Mr. Lewis and Mr. Consoldane, actually it was

20 Mr. Lewis that told you don't listen to his words. They're

21 right, ladies and gentlemen. Don't listen to Dennis' words.

22 Don't listen to my words. Listen to the defendant's words on

23 the tapes. Read the defendant's words in the letters. And

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1 remember just two statements I want to give to you. On
2 December 8th he tells Donna, "I just need to be in that house
3 when he come(s) home," and "You an I are gonna be together if
4 I have to shoot Robert in the fucking head to make it so."
5 Listen to his words and then give him your words, and your
6 words should be guilty.

7 THE COURT: Thank you, Mr. Morrow.

8 MR. CONSOLDANE: Your Honor, can we
9 approach the bench? This doesn't need to be on the record,
10 just a housekeeping matter.

11 THE COURT: Kelly, you want to join us?
12 You want to join us?

13 MR. CONSOLDANE: We don't need the record.

14 THE COURT: You don't need that?

15 MR. CONSOLDANE: No.

16 (Whereupon, a bench conference was held.)

17 THE COURT: Ladies and gentlemen, this
18 will take -- let me, for the record here, you've heard the
19 closing arguments of counsel. I would again remind you what
20 you've heard is not evidence. Of course, you've heard the
21 evidence through the witnesses and these exhibits. You can
22 use any portion or none of anything you've heard by closing
23 arguments, that's up to you, folks. It's merely to help you

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1 think through as they see it. You apply your thinking,
2 however, independently of that.

3 I am going to give you a 10-minute break. When you
4 come back I will then read you the closing instructions.

5 This will probably take about a half hour to 45 minutes and
6 then the case will be delivered to you and we'll go through
7 all that. Very important, I'm sure you remember not to
8 discuss anything or form any opinion until you return. So

9 we'll give you a buzz. We have a couple things we have to
10 put on the record here. It might take a little bit longer
11 than 10 minutes but I don't think much longer, so you're
12 excused. Thank you.

13 (Whereupon, a brief recess was taken by
14 the jury during which the following proceedings commenced.)

15 THE COURT: Okay. The jury is not in the
16 courtroom. The defendant is present with counsel and the
17 State. Do you have something to say for the record, defense?

18 MR. CONSOLDANE: Yes, Your Honor. First
19 of all, I would like to renew all of my objections that I had
20 placed on the record yesterday as to the jury instructions
21 that you are about to read, you know, to the jury,
22 specifically those added instructions as to the trespass. I
23 think they are uncalled for. And then -- and those, I mean,

1 have already been ruled on by the Court to be admissible, I
 2 understand that, but I just want, just to preserve the
 3 record, I would like to put those on the record again now.

4 And then my other objection to these, to the ones
 5 that they just added today. Yesterday they did not have the
 6 lesser included offenses that later on they did add in --

7 MR. MORROW: Murder and voluntary
 8 manslaughter?

9 MR. CONSOLDANE: No, the self-defense is
 10 what, you know, they added in.

11 THE COURT: Self-defense has been added.

12 MR. CONSOLDANE: But you moved -- what
 13 page is that on? Oh, I see. Never mind. It's on page 13.
 14 They did put that back in in the bold print. But when they
 15 moved to the lesser included offenses of murder --

16 THE COURT: They're capitalized.

17 MR. CONSOLDANE: Okay. Yeah, they have
 18 aggravated murder is coming, you know, they have that, you
 19 know, capitalized, several. As a matter of fact, they keep
 20 capitalizing that all the time, and I would object to that.
 21 I think that, you know, they should only capitalize that
 22 once.

23 THE COURT: Your objection is noted for

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1 the record. Overruled.

2 MR. CONSOLDANE: And then when they come

3 to the murder offense, you know, all of a sudden they

4 capitalize aggravated murder again and then all throughout

5 that entire, entire charge they never capitalize murder

6 again. Now, it's kind of just saying, you know, that

7 aggravated murder is important for you to consider, don't

8 consider or read these instructions on murder. And then even

9 further than that, they never even bring up the heading of

10 manslaughter, they just stick it down at the end. The last,

11 the middle of the page on 18 is that not found guilty of

12 murder then guilty of voluntary manslaughter and, you know,

13 that should be, that should be a separate charge showing what

14 the elements of voluntary manslaughter are because they could

15 -- if they find him not guilty of murder they could find him

16 just not guilty. They don't have to say if you find him not

17 guilty of murder you have to find him guilty of voluntary

18 manslaughter, is that they should have what the different --

19 THE COURT: I don't think that that -- if

20 they go down through them all and find him not guilty on all

21 the various subcategories then he would be found not guilty.

22 I don't --

23 MR. MORROW: Quite simply, Your Honor, in

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1 order to get to voluntary manslaughter they have to find him
2 guilty of murder and find him, his culpability reduced by
3 provocation or sudden passion. So if they find in the jury
4 instructions -- and to be honest with you, judge, I took this
5 directly from Ohio Jury Instructions and it uses this exact
6 same language. At 8:30 last night as I sat down preparing
7 these at the Court's request, I apologize for omitting the
8 holds on a couple of murders, but at 8:30 last night I tried
9 to go over to the public defender's office and there was no
10 one at the office for me to deliver them to.

11 MR. CONSOLDANE: Jimmy was there.

12 MR. LEWIS: Chuck, why didn't you go -- I
13 was there. I was there. The light was in the back room, the
14 lights were on.

15 MR. MORROW: Well, I apologize. I didn't
16 pull up to the door. The lights were off. And if you were
17 there, I apologize, Jim.

18 MR. LEWIS: The lights were on. I can't
19 read.

20 THE COURT: We established several times
21 on the record yesterday that the defense has no objection to
22 OJI, pure OJI being used, so that is what is contained in
23 this. Your objection, though, to the failure to capitalize

1 murder three or four times is --

2 MR. CONSOLDANE: Well, I mean, and then
3 also they didn't capitalize the voluntary manslaughter. It's
4 like an afterthought.

5 THE COURT: Okay.

6 MR. CONSOLDANE: And, I mean, if you are
7 going to capitalize aggravated murder then let's capitalize
8 voluntary manslaughter.

9 THE COURT: Well, it's noted on the
10 record. It's overruled, your motion is overruled to --

11 MR. MORROW: To be honest with you, judge,
12 I got the stuff here, I can add the bolds in 30 seconds. And
13 after you are done charging the jury, while we're submitting
14 all the exhibits back to them and they're milling about, I
15 will make that correction, we'll substitute that page with
16 the bolds on it.

17 THE COURT: That's fine if you want to do
18 that. No objection to it, I just don't think that it's
19 anything that should delay this. If it isn't going to delay
20 that any longer than a reasonable time, that's fine, we'll do
21 it that way. Anything else by the defense?

22 MR. LEWIS: Judge, on page 19 it says
23 while committing or attempting to commit. I understand the

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1 first sentence which lays out while committing or attempting
2 to commit means that the aggravated burglary must occur as
3 part of acts --

4 MR. MORROW: I can't understand you, Jim.

5 MR. LEWIS: Let me just ask you, while
6 committing or attempting to commit, is that OJI? That whole
7 thing, that last sentence, "The question of whether the
8 Defendant killed Robert Fingerhut before or after he
9 committed a theft offense is of no consequence."

10 MR. WATKINS: That was discussed and that
11 was in the Supreme Court decisions.

12 MR. CONSOLDANE: That's not OJI?

13 MR. WATKINS: No, it's not OJI.

14 MR. LEWIS: Then, judge, we're objecting
15 to the last sentence there. The first sentence, "'While
16 committing or attempting to commit' means that the aggravated
17 burglary must occur as part of acts leading up to, or
18 occurring during, or immediately after the murder set out in
19 this charge and that the murder was directly associated with
20 the theft offense set out in the charge." That's where it
21 should be -- the last sentence should be -- we're asking that
22 it be deleted. That would also apply in the case of the
23 aggravated robbery. "The question of whether the defendant

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1 killed Robert Fingerhut before or after he committed a theft
2 offense is of no consequence" should --

3 MR. CONSOLDANE: Yeah, that shouldn't be
4 in there. That is --

5 MR. WATKINS: Yes, it is, Your Honor.

6 THE COURT: Well, I think in the Biros
7 case, and what was the name of the case --

8 MR. WATKINS: Biros and Palmer and there's

9 one other case on that point. It is a consequence because
10 the evidence shows that this was taken after he was shot and
11 he immediately died.

12 THE COURT: Yeah.

13 MR. LEWIS: I understand that.

14 THE COURT: You don't have to show that
15 there was intent prior to the meeting.

16 MR. LEWIS: But the first sentence says
17 that the murder was directly associated with the theft
18 offense, okay. Then you turn right around and say, then you
19 turn right around and distinguish that and say the question
20 of whether the defendant killed Robert Fingerhut before or
21 after he committed a theft offense is of no consequence.

22 Well, what it says is that basically is that he murdered

23 Mr. Fingerhut and five years later took his property so no

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1 consequence. Well, it is a consequence. The first sentence
2 sets it out and then the last sentence tells you okay, forget
3 it, it doesn't make any difference. It does make it, it's a
4 consequence. That's what it tells you. It simply
5 obliterates the first sentence.

6 THE COURT: Well, you can add there of no
7 consequence as long as it was a stream of -- occurred during
8 a stream of events.

9 MR. WATKINS: Course of events.

10 THE COURT: Course of events.

11 MR. LEWIS: Well, it already says that in
12 the first sentence. The second sentence is the one that
13 turns around and says it doesn't make any difference.

14 MR. CONSOLDANE: It already says that in
15 the first part. That second part is just too confusing to
16 add to it. It already says that in the first part. You
17 don't need to say it twice.

18 MR. LEWIS: You're saying what they have
19 to find, it has to be associated with the course of events in
20 regard to the theft offense. Then you turn right around and
21 say, well, forget that, you don't have to worry about it.

22 That's not --

23 THE COURT: That merely complies with the

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1 definition of aggravated burglary must occur as a part of the
2 acts leading up to, occurring during or immediately after the
3 murder set out in this charge. All that the courts of appeal
4 has done is said the same thing applies to the theft, you can
5 have the thought before, during or after, it doesn't make any
6 difference as long as it's part of the acts, you know, series
7 of acts or events.

8 MR. LEWIS: Well, we're objecting to that
9 sentence, judge, and then I assume it's -- well, that's the
10 only place it is that I can find, right?

11 MR. MORROW: Uh-huh.

12 MR. LEWIS: Okay.

13 MR. CONSOLDANE: Yeah, the first part of
14 it is all right, it's just that last sentence that doesn't
15 belong here. And, you know, is that they keep quoting all
16 these other cases that, you know, they haven't been
17 overturned. However, the supreme court and the court of
18 appeals have said, you know, Mr. Prosecutor, this is wrong.
19 You know, there's enough evidence. Don't do it again. Just
20 because they didn't overturn it --

21 THE COURT: That doesn't happen to be the
22 case on this point though from these cases.

23 MR. WATKINS: That's from State versus

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1 Biros and other supreme court cases.

2 THE COURT: You'll find cases from all
3 over the State where they've said, well, the prosecutor went
4 beyond the pale but it isn't reversible error and don't do it
5 again, but I don't think that the point we're talking about
6 here is a circumstance of that nature.

7 MR. CONSOLDANE: But, you know, Your
8 Honor, the question of whether this happened has never been
9 an issue during this trial.

10 THE COURT: I don't follow you.

11 MR. CONSOLDANE: Well, in other words,
12 we've never said that the, that the -- we've never contested
13 that there was no, that there was no robbery because it
14 happened after he was dead or anything, that has never been
15 an issue in this trial, and this, this sentence is just too
16 confusing. If that had been an issue in the trial that they
17 took something, we said, after he was dead and therefore it
18 couldn't be a robbery, I'd understand for that sentence then
19 to be in there, but this is not -- we have never asserted
20 that defense nor or even said it to the jury, that it
21 happened after his death. We claim that there may not have
22 been a robbery at all but we never --

23 THE COURT: Mr. Consoldane, the testimony

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1 here was that he got shot in the head and went down like a
2 sack of potatoes and probably took no more than a couple
3 breaths and died.

4 MR. CONSOLDANE: But you never heard us
5 arguing that --

6 MR. WATKINS: Well, we're requesting it,
7 Tony. We're allowed to ask for a clarification and that's
8 what we did.

9 THE COURT: The point is that unless the
10 defendant was very swift he would not have gotten in the car
11 and left after the death -- or before the death, if the
12 forensics, you know, doctor is correct. Your objection,
13 Anthony, will be, you know, I'm overruling it.

14 MR. CONSOLDANE: Okay. And there's one
15 more point to that same thing, Your Honor, is that they say
16 that the question of whether the defendant killed Robert
17 Fingerhut, you know, they're assuming that he killed him in
18 this sentence. Before he committed the offense is of no
19 consequence. And it's just like they're telling the jury
20 that he killed Mr. Fingerhut and he committed this robbery,
21 and because he did it before or after is of no consequence,
22 and I think that that is just very misleading to the jury.

23 THE COURT: No. I think you are again

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1 leaving something out. The whole thing is framed with the
2 sentence that starts the whole thing, if your verdict is, if
3 your verdict is. If your verdict is this then blah, blah,
4 blah. That doesn't direct them to find anything.

5 MR. CONSOLDANE: It doesn't say if.

6 THE COURT: It is their choice as to what
7 they find.

8 MR. CONSOLDANE: It doesn't say if
9 anywhere in this.

10 THE COURT: Not in that particular
11 paragraph, but you don't get to that particular paragraph
12 until you get to the point of finding guilt up above.

13 MR. CONSOLDANE: Well, I just think that
14 sentence on the end is highly prejudicial to the defendant.

15 THE COURT: Well, it is right out of OJI,
16 that portion you're talking about.

17 MR. CONSOLDANE: You know, especially in
18 this case, Your Honor, when no issue has been made that the
19 theft offense occurred after his death. I mean, if we had
20 made that an issue I can understand that this may be
21 important.

22 THE COURT: My reasoning is, Anthony, I
23 would agree with you if it had no part of this, but my

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1 reasoning is based on the fact, as I said, that the jury can
2 very logically find that the deceased did not live for any
3 period of time other than seconds. And they could get back
4 there and say to themselves, well, he couldn't have taken
5 this car during the burglary because the defendant had died,
6 therefore it doesn't fit within the context of the
7 definition. And I'm saying that that question which complies
8 with case law says that if they get to that point it doesn't
9 matter whether he was dead before or after the theft
10 commenced, the offense.

11 MR. CONSOLDANE: But, Your Honor, it says
12 up here during or immediately after, you know, so why do we
13 have to say it again? And these words are very --

14 THE COURT: Where are you reading from?

15 MR. CONSOLDANE: Well, on page 19 you
16 start out "While committing or attempting to commit."

17 THE COURT: Or fleeing immediately after?

18 MR. CONSOLDANE: Yeah. Okay. Now, if you
19 come down here, if you read down there it says that the
20 aggravated burglary must occur as a part of the acts leading
21 up to, or occurring during, or immediately after the
22 murder --

23 THE COURT: Right.

1 MR. CONSOLDANE: -- as set forth, and,
2 you know, it goes on directly associated.

3 THE COURT: And all that last sentence
4 does is say that the same thing applies to the theft as
5 applies to the aggravated burglary, before, during or after.
6 That's all they're doing.

7 MR. LEWIS: Well, --

8 MR. CONSOLDANE: It just it's coming in,
9 it's coming in double. I -- is that every --

10 THE COURT: No, it isn't. We're talking
11 about burglary in one case and we're talking about a theft
12 associated with a burglary in the other. It's two different
13 things.

14 MR. LEWIS: But while committing or
15 attempting, the definition of while committing or attempting
16 to commit means the aggravated burglary must occur as a part
17 of the acts leading up to, or occurring during, or
18 immediately after the murder set out in this charge and that
19 the murder was directly associated with the theft offense set
20 out in this charge. Now, that sets parameters for those
21 jurors to understand that yeah, it can happen before, it can
22 happen after and it can happen during, and you have to
23 associate, it has to be associated with it, whatever. What

1 the next sentence does is just turns the whole thing upside
2 down and eliminates that whole sentence and what they have to
3 find. It says the question of whether the defendant killed
4 Robert Fingerhut before or after he committed a theft offense
5 is of no consequence.

6 THE COURT: Well, the only thing that
7 would comply with your request is that you would read the
8 question or the sentence as follows: The question of whether
9 the defendant killed Robert Fingerhut before or after he
10 committed the theft offense is of no consequence but it must
11 occur as part of the acts leading up to, occurring during or
12 immediately after the murder set out. Now, do you want that
13 added?

14 MR. CONSOLDANE: Well, or -- yeah, and
15 take out the last sentence.

16 THE COURT: No, adding to the last
17 sentence. The last sentence is proper.

18 MR. WATKINS: Your Honor, we have a jury.
19 I don't know why -- Tony said it three times. He goes over
20 and over and over. Whatever he gets he gets, but, I mean,
21 this jury is waiting.

22 MR. LEWIS: Okay. The objection is on the
23 record, judge. All right. Anthony.

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1 THE COURT: Yeah, your objection is noted
2 for the record. Overruled.

3 MR. LEWIS: Anything else?

4 THE COURT: Anything else? I hate to ask.

5 MR. CONSOLDANE: Wait. I'm not -- let me
6 just -- I had it marked somewhere.

7 THE COURT: Nothing? Thank you. Anything
8 by the State?

9 MR. WATKINS: No, Your Honor. We're ready
10 to go.

11 THE COURT: Okay. Let's get the jury up
12 here.

13 (Whereupon, the jury was seated in the
14 jury box and the following proceedings commenced.)

15 CHARGE OF THE COURT

16 THE COURT: Be seated, please. Okay.
17 We're all back. Can you hear me okay? No? If I get up
18 closer to this can you hear me?

19 Now, ladies and gentlemen, you've heard everything
20 except the charge of the Court, the closing instructions.
21 I've often thought that it would take a Richard Burton or a
22 Sean Connery to make closing instructions sound good, but
23 they are very important. There is some repetition and it's

1 necessary that we do that. The important thing is that you
2 try to grasp the content of the instructions. The nice part
3 is that with our advent of computers it now becomes possible
4 to give the jury a written copy of the instructions. That's
5 always been a problem in the past, it would take somebody to
6 type them, but now it can be done rather quickly, so you will
7 have a copy of these but it is necessary that I try to
8 explain them to you beforehand.

9 Members of the jury, you have heard the evidence and
10 the arguments of counsel. The Court and the jury have
11 separate functions. You are called upon to decide the
12 disputed facts and the Court provides the instruction of law.
13 It is your sworn duty to accept these instructions and to
14 apply the law as it is given to you. You are not permitted
15 to change the law nor to apply your own conception of what
16 you think the law should be. Similarly, the Court may not
17 interfere in any way with your function as jurors.

18 Now, a criminal case begins with the filing of an
19 indictment. The indictment informs the defendant that he has
20 been charged with an offense. The fact that an indictment
21 was filed may not be considered by you for any purpose. The
22 plea of guilty entered in this case -- I'm sorry, the plea of
23 not guilty. We wouldn't be here if there was a plea of

1 guilty. The plea of not guilty is a denial of the charges
2 and specifications and that puts in issue all of the
3 essential elements of each charge and specification. That
4 puts the burden of proof upon the State to prove each and
5 every element of each offense.

6 Now, the defendant is presumed innocent unless his
7 guilt is established beyond a reasonable doubt, and the
8 defendant must be acquitted of an offense unless the State
9 produces evidence which convinces you beyond a reasonable
10 doubt of every essential element of that offense and
11 specification charged in the indictment.

12 Now, reasonable doubt is present when, after you
13 have carefully considered and compared all of the evidence,
14 no matter who produced it, you cannot say that you are firmly
15 convinced of the truth of the charge. Reasonable doubt is a
16 doubt based on reason and common sense. Reasonable doubt is
17 not mere possible doubt because everything relating to human
18 affairs or depending on moral evidence is open to some
19 possible or imaginary doubt. Proof beyond a reasonable doubt
20 is proof of such character that an ordinary person would be
21 willing to rely and act upon it in the most important of his
22 or her own personal affairs.

23 Now, you must determine the issues in this case from

1 the evidence and the evidence is all the testimony received
2 from the witnesses, the exhibits admitted during the trial,
3 and any stipulations or agreement by counsel. Evidence
4 itself may be either direct or circumstantial or both.

5 Direct evidence is the testimony given by a witness
6 who has seen or heard the facts to which they've testified,
7 and it also includes the exhibits admitted during the trial
8 which you will have with you, of course, back in the jury
9 room. Now, circumstantial evidence is the proof of facts or
10 circumstances by direct evidence from which you may
11 reasonably infer other related or connected facts which
12 naturally and logically follow according to the common
13 experience of mankind.

14 To infer or to make an inference is to reach a
15 reasonable conclusion or deduction of fact which you may, but
16 are not required to, make from other facts which you find
17 have been established by direct evidence. Now, whether an
18 inference is made or not rests entirely with you, but direct
19 and circumstantial evidence are of equal weight or probative
20 value.

21 Now, the evidence does not include the indictment or
22 the opening statements or closing arguments of counsel. The
23 opening statements and the closing arguments of counsel are

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1 designed to assist you but they are not evidence.

2 Statements or answers that were stricken by the

3 Court, or which you were instructed to disregard, that

4 happened several times, are not evidence and must be treated

5 as though you never heard them. You must not speculate as to

6 why the Court sustained any objection to any question or what

7 the answer to such question might have been, and you also

8 must not draw any inference or speculate upon the truth of

9 any suggestion included in a question that was not answered.

10 The things you saw during the jury view are not evidence

11 either, but they may be of some help for you to understand

12 the evidence.

13 As I've repeatedly told you, you are the sole judge

14 of the facts in this case, also the credibility of the

15 witnesses and the weight of the evidence. To weigh the

16 evidence you must consider the credibility of the witnesses.

17 You will apply the tests of truthfulness which you apply in

18 your daily lives. These tests include the appearance of each

19 witness upon the stand; his or her manner of testifying; the

20 reasonableness of his or her testimony; the opportunity that

21 person had to see, hear or know about that to which they have

22 testified; his or her accuracy of memory; their frankness or

23 lack of it; their intelligence, interest and bias, if any;

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1 put together with all the facts and circumstances surrounding
2 the testimony. Applying these tests you will assign to the
3 testimony of each witness such weight as you deem proper.

4 You are not required to believe the testimony of any
5 witness simply because he or she was under oath. You may
6 believe or disbelieve all or any part of the testimony of any
7 witness. It is within your province to determine what
8 testimony is worthy of belief and what testimony is not
9 worthy of belief.

10 Now, generally a witness may not express an opinion
11 from the stand. However, one who follows a profession or
12 special line of work may express his or her opinion because
13 of that person's education, their knowledge or experience.
14 Such testimony is admitted for whatever assistance it may
15 provide to help you in arriving at a just verdict because all
16 that they are giving is their opinion but it's for your
17 information and help.

18 As with other witnesses, upon you alone rests the
19 duty to decide what weight is to be given to the testimony of
20 any expert. In determining an expert's testimony you will
21 determine its weight, and you may take into consideration his
22 or her skill, experience, knowledge, veracity, familiarity
23 with the facts of the case, and the usual rules for testing

1 credibility and determining the weight to be given to that
2 testimony.

3 the It is not necessary that the defendant take the
4 witness stand in his own defense. He has a constitutional
5 right, as we all do, not to testify. The fact that the
6 defendant did not testify must not be considered by you for
7 any purpose.

8 In this case it has been indicated that the
9 defendant fled from the vicinity of the crime and remained at
10 large for a period of approximately 10 days. In regard to
11 this evidence you are instructed that flight in and of itself
12 does not raise any presumption of guilt, but it may tend to
13 show consciousness of guilt or a guilty connection with the
14 crime. If, therefore, you find that the defendant did flee
15 from the scene of the alleged crime you may consider the
16 circumstances in the case in determining the question of
17 guilt or innocence of the defendant, but upon you alone rests
18 the decision to determine what weight, if any, you place upon
19 the evidence you find, if any, which bears on this issue.

20 I merely mention that because the State has alleged
21 certain things along that line, depending on what your
22 finding is, whether or not that would be appropriate or not.

23 The right of the Court to try the defendant depends

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1 upon proof that the offense was committed in Trumbull County,
2 Ohio. This is called venue and venue is an essential element
3 of the offenses charged in the indictment, and as with other
4 elements, must be proven by the State beyond a reasonable
5 doubt.

6 Now, getting to the indictment itself, the defendant
7 is charged with a total of four counts and six specifications
8 as follows: Count One, aggravated murder with two
9 specifications; Count Two, aggravated murder with two
10 specifications; Count Three, aggravated burglary with one
11 specification; and Count Four, aggravated robbery with one
12 specification.

13 Although the counts are numbered in chronological
14 order, it may be best that I instruct you on the aggravated
15 burglary and aggravated robbery counts before I instruct you
16 on the aggravated murder counts as some of the same terms
17 that I am going to define for you relative to those charges
18 will also be used in the aggravated murderer instructions and
19 to avoid having to repeat the same thing I've already told
20 you.

21 In Count Three of the indictment the defendant has
22 been charged with, on Count Three, aggravated burglary. Now,
23 before you can find the defendant guilty of aggravated

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1 burglary you must find beyond a reasonable doubt that on or
2 about the 11th day of December, 2001, and in Trumbull County,
3 Ohio, the defendant did by force, stealth or deception,
4 trespass in an occupied structure when a person other than an
5 accomplice of the offender was present and with purpose to
6 commit aggravated murder or aggravated robbery, and that at
7 the time the defendant did inflict or attempted or threatened
8 to inflict physical harm on others and/or the defendant had a
9 deadly weapon on or about his person or under his control; in
10 this case, a firearm.

11 Some terms now I must define for you. Force means
12 any violence, compulsion or constraint used by any means upon
13 or against a person or thing to gain entrance.

14 Stealth means a secret, sly or clandestine act to
15 gain entrance.

16 Deception means knowingly deceiving or causing
17 another to be deceived by any false or misleading
18 representation or by any other conduct, act or omission which
19 creates, confirms or perpetuates a false impression in
20 another's mind to gain entrance.

21 Trespass means knowingly entering upon the land or
22 premises of another without privilege to do so. Any entrance
23 or remaining is knowingly made in a structure of another that

1 is unlawful if it is without the authority, consent or
2 privilege to do so.

3 Where a defendant lawfully entered a residential
4 premises, the privilege to be in or upon this premises can be
5 inferred to have been revoked where the defendant thereafter
6 commits a violent felony directed against another person in
7 the premises who had the ability and authority to revoke the
8 privilege.

9 Where one enters upon the property of another as an
10 invitee or licensee, that person loses his status as an
11 invitee or licensee and becomes a trespasser when it becomes
12 evident that the purpose of such entry is to commit a
13 criminal offense against the owner.

14 Occupied structure means any house, building or
15 other structure which is maintained as a permanent or
16 temporary dwelling.

17 A person acts purposely when it is his or her
18 specific intention to cause a certain result. It must be
19 established in this case that at all times in question there
20 was present in the mind of the defendant a specific intention
21 to murder Robert Fingerhut and/or rob him.

22 Purpose is a decision of the mind to do an act with
23 a conscious objective of producing a specific result. To do

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1 an act purposely is to do it intentionally and not
2 accidentally. Purpose and intent mean the same thing. The
3 purpose with which a person does an act is known only to
4 himself, unless that person expresses it to others or
5 indicates it by his conduct.

6 The purpose with which a person does an act is
7 determined from the manner in which it is done, the means and
8 weapons used, and all the other facts and circumstances in
9 evidence.

10 Proof of motive is not required. The presence or
11 absence of motive is in and of itself -- let me reread that.

12 The purpose or absence of motive is one of the circumstances
13 bearing upon privilege.

14 MR. LEWIS: I'm sorry. Go ahead, judge.

15 THE COURT: I've read that correctly,
16 though there was a letter missing.

17 MR. LEWIS: I'm sorry.

18 THE COURT: Yeah.

19 MR. MORROW: Can we approach one moment,
20 Your Honor?

21 (Whereupon, a bench conference was held.)

22 MR. LEWIS: Are you going to read it over?

23 THE COURT: Yeah. I made the correction

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1 where there was a typo but then I read one of the words
2 wrong. That won't do. Okay. Let me read that over.

3 MR. CONSOLDANE: Yeah. I objected to what
4 they just -- just note an objection on the record.

5 THE COURT: Well, for the record, the
6 prosecution in coming up with counsel for the defendant to
7 advise me that I had misread a word, the prosecutor got here
8 first so I listened to him, but defense counsel was right
9 beside him.

10 Proof of motive is not required. The presence or
11 absence of motive is one of the circumstances bearing upon
12 purpose. I said privilege. Upon purpose.

13 Privilege means an immunity, license or right
14 conferred by law or bestowed by express or implicit grant, or
15 arising out of status, position, office, or relationship, or
16 growing out of necessity.

17 Aggravated murder will be defined below.

18 Physical harm to persons. Physical harm to persons
19 means any injury, illness or other physiological impairment
20 regardless of its gravity or duration.

21 Deadly weapon means any instrument, device or thing
22 capable of inflicting death, or designed or specifically
23 adapted for use as a weapon, or possessed, carried or used as

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1 a weapon.

2 If you find that the State proved beyond a
3 reasonable doubt all of the essential elements of the offense
4 of aggravated burglary, your verdict must be guilty of
5 aggravated burglary. If you find that the State failed to
6 prove any one of the essential elements of the offense of
7 aggravated burglary, your verdict must be not guilty.

8 Now, if you find the defendant guilty of Count Three
9 of aggravated burglary it is your duty to deliberate further
10 and decide one specification attached to Count Three. You
11 will proceed to consider whether the specification has been
12 proven, again beyond a reasonable doubt, if, and only if, you
13 determine that the defendant is guilty of aggravated
14 burglary. If your verdict is not guilty, then you would not
15 consider the specification. If your verdict is guilty, the
16 defendant may be found guilty or not guilty of the
17 specification. Understand?

18 The specification is that Nathaniel E. Jackson did
19 at the time of the commission of the offense have a firearm
20 on or about his person or under his control, and displayed
21 the firearm, brandished the firearm, or used it to facilitate
22 the offense.

23 Firearm means any deadly weapon capable of expelling

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1 or propelling one or more projectiles by the action of an
2 explosive or combustible propellant. Firearm includes an
3 unloaded firearm and any firearm which is inoperable but
4 which can be readily made operable. Let me read that again.
5 Firearm includes an unloaded firearm and any firearm which is
6 inoperable but which can be readily rendered operable.

7 When deciding whether a firearm is capable of
8 expelling or propelling one or more projectiles by the action
9 of an explosive or combustible propellant you may rely on
10 circumstantial evidence, including but not limited to the
11 statements and actions of the individual exercising control
12 over the firearm, if there be such.

13 On or about the defendant's person or under the
14 defendant's control means that the firearm was on the
15 defendant's person or so near the defendant as to be
16 conveniently accessible and within the defendant's immediate
17 physical reach.

18 Thus, if as to this specification you find that the
19 State proved beyond a reasonable doubt all of the essential
20 elements of the specification, your verdict must be guilty of
21 that specification. If you find that the State failed to
22 prove beyond a reasonable doubt any one of the essential
23 elements of the specification, then you must find the

1 defendant not guilty of that specification.

2 Now, in Count Four of the indictment the defendant

3 is charged with, on Count Four, aggravated robbery. Before

4 you can find the defendant guilty of aggravated robbery you

5 must find beyond a reasonable doubt that on or about the 11th

6 day of December, 2001, and in Trumbull County, Ohio, the

7 defendant, while committing or attempting to commit a theft

8 offense, had a deadly weapon on or about his person or under

9 his control and either brandished it or used it, or that the

10 defendant inflicted serious physical harm on others.

11 Some more terms. An attempt is one -- is when one

12 purposely does anything which is an act constituting a

13 substantial step in a course of conduct planned to culminate

14 in his commission of the crime. To constitute a substantial

15 step the conduct must be strongly corroborative of the

16 actor's criminal purpose.

17 While committing or attempting to commit means that

18 having a deadly weapon on or about his person or under his

19 control or the infliction of serious physical harm must occur

20 as part of acts leading up to, occurring during or

21 immediately after the theft or attempted theft set out in

22 this charge, and that the having of a deadly weapon on or

23 about the person or under his control or the infliction of

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1 serious physical harm was directly associated with the theft
2 offense set out in this charge. Now, the question of whether
3 the defendant had a deadly weapon on or about his person or
4 under his control or the inflicted serious physical harm
5 before or after he stole or attempted to steal is of no
6 consequence.

7 A theft offense occurs when a person, with purpose
8 of, deprive the owner of property, knowingly obtains or exerts
9 control over that property without the consent of the owner
10 or beyond the scope of the express or implied consent of the
11 owner or person authorized to give consent, or by deception,
12 or by threat.

13 A person acts knowingly, regardless of his purpose,
14 when he is aware that his conduct will probably cause a
15 certain result or that he is aware that his conduct will
16 probably be of a certain nature. A person has knowledge of
17 circumstances when he is aware that such circumstances
18 probably exist.

19 Since you cannot look within the mind of another,
20 knowledge is determined from all the facts and circumstances
21 in evidence. You will determine from these facts and
22 circumstances whether there existed at the time in the mind
23 of the defendant the intent to obtain or exert control over

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1 the property.

2 Property means any property, real or personal,
3 tangible or intangible, and any interest or license in such
4 property.

5 Deprive means to withhold property of another
6 permanently, or for such a period as to appropriate a
7 substantial portion of its value or use, or to dispose of
8 property as to make it unlikely that the owner will recover
9 it.

10 Owner means any person, other than the actor, who is
11 the owner of or who has possession or control of, or any
12 license or interest in property or services, even if such
13 ownership, possession, control, license or interest is
14 unlawful.

15 Consent may -- I'm sorry. Consent may be either
16 express or implied consent. Express consent is determined by
17 the written or spoken words of the person involved. Implied
18 consent is determined by the facts and circumstances which
19 surround those involved, including their words and acts, from
20 which you may infer that consent was given to the defendant.

21 Now, threat includes both a direct threat or an
22 indirect threat.

23 Deadly weapon I have previously defined for you.

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1 Serious physical harm to persons means any of the
2 following: Any mental illness or condition of such gravity
3 as would normally require hospitalization or prolonged
4 psychiatric treatment; any physical harm that carries a
5 substantial risk of death; any physical harm that involves
6 some permanent incapacity, whether partial or total, and that
7 involves some temporary, substantial incapacity; any physical
8 harm that involves some permanent disfigurement or that
9 involves some temporary, serious disfigurement; or any
10 physical harm that involves acute pain of such duration as to
11 result in substantial suffering or that involves any degree
12 of prolonged or intractable pain.

13 Now, if you find that the State has proved beyond a
14 reasonable doubt all of the essential elements of the offense
15 of aggravated robbery, then your verdict must be guilty of
16 aggravated robbery. If you find that the State has failed to
17 prove any one of the essential elements of the offense of
18 aggravated robbery, your verdict must be not guilty.

19 If you find the defendant guilty of Count Four of
20 aggravated robbery it is your duty to deliberate further and
21 decide one specification attached to Count Four. You will
22 proceed to consider whether the specification has been proven
23 beyond a reasonable doubt if, and only if, you determine that

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1 the defendant is guilty of aggravated robbery. If your
2 verdict is not guilty, then you would not consider the
3 specification. If your verdict is guilty, then the defendant
4 may be found guilty or not guilty of the specification.

5 Now, the specification attached is that Nathaniel E.
6 Jackson did at the time of the commission of the offense have
7 a firearm on or about his person or under his control and
8 displayed the firearm, brandished the firearm, or used it to
9 facilitate the offense.

10 I defined all the relevant terms in that definition
11 previously to you on the prior specification.

12 Thus, if as to this specification you find that the
13 State proved beyond a reasonable doubt all of the essential
14 elements of the specification, your verdict must be guilty on
15 that specification. If you find that the State failed to
16 prove beyond a reasonable doubt any one of the essential
17 elements of the specification, then you must find the
18 defendant not guilty of that specification.

19 Now, in Count One of the indictment the defendant is
20 charged with aggravated murder. With respect to this count,
21 aggravated murder is purposely causing the death of another
22 with prior calculation and design.

23 Before you can find the defendant guilty of

1 aggravated murder in Count One you must find beyond a
2 reasonable doubt that on or about the 11th day of December,
3 2001, and in Trumbull County, Ohio, the defendant purposely,
4 and with prior calculation and design, caused the death of
5 Robert S. Fingerhut.

6 Some more terms. I previously defined purpose.

7 Dangerous weapon. In addition, if a wound is
8 inflicted upon a person with a deadly weapon in a manner
9 calculated to destroy life or inflict great bodily harm, the
10 purpose to cause death may be inferred from the use of the
11 weapon.

12 No person shall be convicted of aggravated murder
13 unless he or she is specifically found to have intended to
14 cause the death of another.

15 Prior calculation and design means that the purpose
16 to cause death was reached by a definite process of reasoning
17 in advance of the homicide, which process of reasoning must
18 have included a mental plan involving studied consideration
19 of the method and the means by which to cause the death of
20 another.

21 To be prior calculation there must have been
22 sufficient time and opportunity for the planning of an act of
23 homicide, and the circumstances surrounding the homicide must

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1 show a scheme designed to carry out the calculated decision
2 to cause death. No definite period of time must elapse and
3 no particular amount of consideration must be given, but
4 acting on the spur of the moment or after momentary
5 consideration of the purpose to cause death is not
6 sufficient.

7 The State charges that the act of the defendant
8 caused the death of Robert S. Fingerhut. Cause is an
9 essential element of the offense. Cause is an act or failure
10 to act which in a natural and continuous sequence directly
11 produces the death, and without which it would not have
12 occurred.

13 The defendant is asserting an affirmative defense
14 known as self-defense. The burden of going forward with the
15 evidence of self-defense and the burden of proving an
16 affirmative defense are upon the defendant. He must
17 establish such a defense by a preponderance of the evidence.

18 Preponderance of the evidence is the greater weight
19 of the evidence; that is, evidence that you believe because
20 it outweighs or overbalances in your mind the evidence
21 opposed to it. A preponderance means evidence that is more
22 probable, more persuasive, or of greater probative value. It
23 is the quality of the evidence that must be weighed. Quality

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1 may or may not be identical with the quantity of witnesses.

2 Now, in determining whether or not an affirmative

3 defense has been proven by a preponderance of the evidence

4 you should consider all of the evidence bearing upon that

5 affirmative defense regardless of who produced it. If the

6 weight of the evidence is equally balanced or if you are

7 unable to determine which side of an affirmative defense has

8 the preponderance, then the defendant has not established

9 such affirmative defense.

10 If the defendant fails to establish the defense of

11 self-defense, the State still must prove to you beyond a

12 reasonable doubt all of the elements of the crime charged or

13 any lesser included offense.

14 Now, to establish self-defense the defendant must

15 prove, A, he was not at fault in creating the situation

16 giving rise to the shooting of Robert Fingerhut; B, he had

17 reasonable grounds to believe and an honest belief that he

18 was in imminent danger of death or great bodily harm, and

19 that his only means of escape from such danger was by the use

20 of deadly force; and, C, he had not violated any duty to

21 retreat to avoid the danger.

22 Now, the defendant had a duty to retreat if, A, the

23 defendant was at fault in creating the situation giving rise

1 to the shooting of Robert Fingerhut; or, B, the defendant did
2 not have reasonable grounds to believe and an honest belief
3 that he was in imminent danger of death or great bodily harm,
4 and that his only means of escape from the danger was by the
5 use of deadly force. But if the defendant retreated from the
6 situation, he no longer had a duty to retreat, and if the
7 defendant then had reasonable grounds to believe and an
8 honest belief that he was in imminent danger of death or
9 great bodily harm and that the only means of escape from that
10 danger was by the use of deadly force, then the defendant was
11 justified in using deadly force, even though he was mistaken
12 as to the existence of the danger.

13 Words alone do not justify the use of deadly force.
14 Resort to such force is not justified by abusive language,
15 verbal threats or other words, no matter how provocative. In
16 deciding whether the defendant had reasonable grounds to
17 believe and an honest belief that he was in imminent danger
18 of death or great bodily harm, you must put yourself in the
19 position of the defendant with his characteristics and his
20 knowledge, or lack of knowledge, and under the circumstances
21 and conditions that surrounded him or her at the time. You
22 must consider the conduct of Robert Fingerhut and decide if
23 his acts and words caused the defendant reasonably and

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1 honestly to believe that he was about to be killed or receive
2 great bodily harm.

3 ~~one purpose~~ ~~or any of~~ Excessive force. The law does not measure nicely
4 the degree of force which may be used to repel an attack.
5 However, if the defendant used more force than reasonably
6 appears to be necessary under the circumstances and if the
7 force used is so greatly disproportionate to his apparent
8 danger as to show an unreasonable purpose to injure Robert
9 Fingerhut, then the defense of self-defense is not available.

10 If you find that the State proved beyond a
11 reasonable doubt all of the elements, essential elements of
12 the offense of aggravated murder as charged in Count One of
13 the indictment and the defendant has failed to prove by a
14 preponderance of the essential elements of self-defense, then
15 your verdict must be guilty as to Count One, and in that
16 event you will not consider any lesser offense. If you find
17 that the State failed to prove beyond a reasonable doubt that
18 the aggravated murder was done purposely, or any of the other
19 essential elements of the offense of aggravated murder as
20 charged in Count One, or if you find that the defendant has
21 proven by a preponderance of the evidence all of the
22 essential elements of self-defense, your verdict must be not
23 guilty of that offense.

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1 So, on the other hand, if you find that the State
2 failed to prove beyond a reasonable doubt that the aggravated
3 murder was done purposely or any of the other essential
4 elements of the offense of aggravated murder as charged in
5 Count One of the indictment, and the defendant has failed to
6 prove by a preponderance all of the essential elements of
7 self-defense, then your verdict must be not guilty of that
8 offense; and in that event, you will continue your
9 deliberations to decide whether the State has proven beyond a
10 reasonable doubt all of the essential elements of the lesser
11 included offense of murder.

12 Now, the offense of murder is distinguished from
13 aggravated murder in this count by the absence or failure to
14 prove prior calculation and design.

15 Before you can find the defendant guilty of the
16 lesser included offense of murder you must find beyond a
17 reasonable doubt that on or about the 11th day of December,
18 2001, and in Trumbull County, Ohio, the defendant purposely
19 caused the death of Robert S. Fingerhut.

20 I believe all the relevant terms have been
21 previously defined for you.

22 Now, with respect to this lesser included offense,
23 the defendant claims that at the time of the offense he acted

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1 knowingly while under the influence of sudden passion or in a
2 sudden fit of rage, either of which was brought on by serious
3 provocation occasioned by Robert S. Fingerhut that was
4 reasonably sufficient to incite the defendant into using
5 deadly force.

6 The defendant is asserting an affirmative defense
7 known as serious provocation or sudden fit of rage. The
8 burden of going forward with the evidence of this and the
9 burden of proving an affirmative defense are upon the
10 defendant. He must establish such a defense by a
11 preponderance of the evidence, which has been previously
12 defined for you. And if the defendant fails to establish the
13 defense of serious provocation or sudden fit of rage, the
14 State must still prove to you beyond a reasonable doubt all
15 the elements of the crime charged, being murder, or any
16 lesser included offense.

17 Now, the defendant is under the influence of sudden
18 passion or in sudden fit of rage when there is serious
19 provocation occasioned by the victim that is reasonably
20 sufficient to incite a person into using deadly force and is
21 an act done in the heat of blood without time to reflect or
22 for passions to cool.

23 For provocation to be reasonably sufficient to bring

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1 on sudden passion or a sudden fit of rage you must determine
2 that the provocation was sufficient to arouse the passions of
3 an ordinary person beyond the power of his control.

4 In determining whether the defendant was actually
5 under the influence of sudden passion or a sudden fit of rage
6 you must consider the emotional and mental state of the
7 defendant and the conditions and circumstances that
8 surrounded him at the time of his act.

9 on the of I have previously defined deadly force for you.

10 Substantial risk means a strong possibility as
11 contrasted with a remote or even a significant --

12 insignificant possibility -- is that correct, what's written
13 there? Substantial risk means a strong possibility as
14 contrasted with a remote --

15 MR. LEWIS: Even a significant
16 possibility, judge. That's what I have here, yeah.

17 THE COURT: Or even a significant
18 possibility?

19 MR. LEWIS: Yeah, it says significant.

20 THE COURT: Significant. Okay. So it's
21 distinguishing between a strong possibility and a significant
22 possibility. Let me start over again.

23 Substantial risk means a strong possibility as

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1 contrasted with a remote or even a significant possibility
2 that a certain result may occur or that certain circumstances
3 may exist. The defendant

4 If you find that the State proved beyond a
5 reasonable doubt that the defendant purposely caused the
6 death of Robert Fingerhut and you also find that the
7 defendant failed to prove by the greater weight of the
8 evidence that he knowingly acted while under the influence of
9 sudden passion or in a sudden fit of rage, either of which
10 was brought on by serious provocation occasioned by the
11 victim that was reasonably sufficient to incite the defendant
12 into using deadly force, then you must find the defendant
13 guilty of murder.

14 If you find that the State failed to prove beyond a
15 reasonable doubt that the defendant purposely caused the
16 death of Robert Fingerhut, then you must find the defendant
17 not guilty of murder.

18 If you find that the State proved beyond a
19 reasonable doubt that the defendant purposely caused the
20 death of Robert Fingerhut but you also find that the
21 defendant proved by the greater weight of the evidence that
22 he acted knowingly while under the influence of sudden
23 passion or in a sudden fit of rage, either of which was

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1 brought on by serious provocation occasioned by the victim
2 that was reasonably sufficient to incite the defendant into
3 using deadly force, then you must find the defendant not
4 guilty of murder and guilty of voluntary manslaughter.

5 Excuse me. Now, if the evidence warrants it, you
6 may find the defendant guilty of an offense lesser than that
7 charged in the indictment. However, notwithstanding this
8 right, it is your duty to accept the law as given to you by
9 the Court, and if the facts and the law warrant a conviction
10 of the offense charged in the indictment, then it is your
11 duty to make such finding uninfluenced by your power to find
12 a lesser offense. This provision is not designed to relieve
13 you from the performance of an unpleasant duty. It is
14 included to prevent failure of justice if the evidence fails
15 to prove the original charge but does justify a verdict for
16 the lesser offense.

17 Now, if you find the defendant guilty of aggravated
18 murder as charged in the indictment it is your duty to
19 deliberate further and to decide additional factual
20 questions, which we call specifications, relative to that
21 count.

22 This count sets forth two specifications. You will
23 proceed to consider whether each specification to this count

1 has been proven beyond a reasonable doubt if, and only if --
2 excuse me, I'm losing my voice. My father had a loud,
3 booming voice and I didn't get it. Excuse me.

4 I'm on paragraph two right on page 19 there? I lost
5 my place.

6 MR. MORROW: This count.

7 MR. CONSOLDANE: Top of page 19.

8 THE COURT: Okay. Let me start on the
9 first paragraph on that page. This count sets forth two
10 specifications. You will proceed to consider whether each
11 specification to this count has been proven beyond a
12 reasonable doubt if, and only if, you determine that the
13 defendant is guilty of this count. If your verdict is not
14 guilty as to the aggravated murder, then you would not
15 consider any of the specifications attached to this count.
16 Give me a minute, okay? I apologize, folks.

17 MR. LEWIS: Want some water, judge?

18 THE COURT: Oh, sure.

19 MR. LEWIS: This is yours. I took it.

20 THE COURT: Yeah. You wish me to wait for
21 Anthony?

22 MR. LEWIS: No, judge.

23 THE COURT: Specification One to Count One

charges that the defendant committed the aggravated murder while committing, attempting to commit, or fleeing immediately after committing aggravated burglary, and that the defendant was either the principal offender in the commission of the aggravated murder or, if not the principal offender, he committed the aggravated murder with prior calculation and design.

Aggravated burglary has already been defined for you.

Principal offender means one who personally performs every act constituting the offense which, relative to this specification, is aggravated murder.

While committing or attempting to commit means that the aggravated burglary must occur as part of acts leading up to or occurring during or immediately after the murder set out in this charge and that the murder was directly associated with the theft offense set out in this charge. The question of whether the defendant killed Robert Fingerhut before or after he committed a theft offense is not of any consequence, that is it could occur leading up to, during, or at the conclusion or immediately after.

Prior calculation and design has been previously defined.

1 Before you can find the defendant guilty of
2 Specification One to Count One you must find that the State
3 has proven beyond a reasonable doubt that the defendant
4 committed the aggravated murder while he was committing,
5 attempting to commit, or fleeing immediately after committing
6 aggravated burglary, and that the defendant was either the
7 principal offender in the commission of the aggravated murder
8 or, if not the principal offender, he committed the
9 aggravated murder with prior calculation and design.
10 If you find that the State proved beyond a
11 reasonable doubt all of the essential elements of this
12 specification, then your verdict must be guilty as to that
13 specification. If you find that the State failed to prove
14 beyond a reasonable doubt any one of the essential elements
15 of this specification, your verdict must be not guilty as to
16 that specification.

17 Specification Two to Count One charges that the
18 defendant committed the aggravated murder while committing,
19 attempting to commit, or fleeing immediately after committing
20 aggravated robbery, and that the defendant was either the
21 principal offender in the commission of the aggravated murder
22 or, if not the principal offender, he committed the
23 aggravated murder with prior calculation and design.

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1 I have previously defined, I believe, all relevant
2 terms to that.

3 Before you can find the defendant guilty of
4 Specification Two to Count One you must find that the State
5 has proven beyond a reasonable doubt that the defendant
6 committed the aggravated murder while he was committing,
7 attempting to commit, or fleeing immediately after committing
8 aggravated robbery, and that the defendant was either the
9 principal offender in the commission of the aggravated murder
10 or, if not the principal offender, he committed the
11 aggravated murder with prior calculation and design.

12 In Count Two of the indictment the defendant is
13 charged with, Count Two, aggravated murder. Now, with
14 respect to this count, aggravated murder is purposely causing
15 the death of another while committing, attempting to commit,
16 or fleeing immediately after committing aggravated robbery
17 and/or aggravated burglary.

18 Before you can find the defendant guilty of
19 aggravated murder on this count you must find beyond a
20 reasonable doubt that on or about the 11th day of December,
21 2001, and in Trumbull County, Ohio, the defendant purposely
22 caused the death of Robert S. Fingerhut while the defendant
23 was committing, attempting to commit, or fleeing immediately

1 after committing or attempting to commit aggravated robbery
2 and/or aggravated burglary.

3 Again, I've defined all relevant terms for you.

4 As with Count One, the defendant is asserting the
5 defense of self-defense. All relevant terms with respect to
6 self-defense have been previously defined for you.

7 If you find that the State proved beyond a
8 reasonable doubt all of the essential elements of the offense
9 of aggravated murder as charged in Count Two and the
10 defendant has failed to prove by a preponderance all of the
11 essential elements of self-defense, your verdict must be
12 guilty as to Count Two, and in that event you would not
13 consider any lesser offense.

14 On the other hand, if you find that the State failed
15 to prove beyond a reasonable doubt that the aggravated murder
16 was done purposely, or any of the other essential elements of
17 the offense of aggravated murder as charged in Count One of
18 the indictment, and the defendant has failed to prove by a
19 preponderance all of the essential elements of self-defense,
20 then your verdict must be not guilty of that offense, and in
21 that event you will continue your deliberations to decide
22 whether the State has proved beyond a reasonable doubt all of
23 the essential elements of the lesser included offense of

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1 murder.

2 The offense of murder is distinguished from
3 aggravated murder in this count by the absence or failure to
4 prove that the murder was purposely committed.

5 Before you can find the defendant guilty of the
6 lesser included offense of murder you must find beyond a
7 reasonable doubt that on or about the 11th day of December,
8 2001, and in Trumbull County, Ohio, that the defendant caused
9 the death of Robert S. Fingerhut as a proximate result of the
10 defendant committing, attempting to commit, or attempting to
11 commit aggravated burglary or aggravated robbery. That
12 should be and/or, right?

13 MR. LEWIS: And/or, yes, judge.

14 THE COURT: Yeah. I've previously defined
15 all relevant terms.

16 With respect to this lesser included offense, the
17 defendant claims that at the time of the offense he acted
18 while under the influence of sudden passion or a sudden fit
19 of rage, either of which was brought on by serious
20 provocation occasioned by Robert Fingerhut that was
21 reasonably sufficient to incite the defendant into using
22 deadly force.

23 I've defined all those on the previous definition

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1. which is the same.

2. Now, if you find that the State proved beyond a

3. reasonable doubt that the defendant caused the death of

4. Robert S. Fingerhut as a proximate result of the defendant

5. committing or attempting to commit aggravated burglary or

6. aggravated robbery, and you also find that the defendant

7. failed to prove by a greater weight of the evidence that he

8. knowingly acted while under the influence of sudden passion

9. or a sudden fit of rage, either of which was brought on by

10. a serious provocation occasioned by the victim that was

11. reasonably sufficient to incite the defendant into using

12. deadly force, then you must find the defendant guilty of

13. murder.

14. Conversely, if you find that the State failed to

15. prove beyond a reasonable doubt that the defendant caused the

16. death of Robert S. Fingerhut as a proximate result of the

17. defendant committing, attempting to commit, or attempting to

18. commit aggravated burglary or aggravated robbery, then you

19. must find the defendant not guilty of murder.

20. If you find that the State proved beyond a

21. reasonable doubt that the defendant caused the death of

22. Robert S. Fingerhut as a proximate result of the defendant

23. committing or attempting to commit aggravated burglary or

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1 aggravated robbery but you also find that the defendant
2 proved by a greater weight of the evidence that he acted
3 knowingly while under the influence of sudden -- or sudden
4 passion -- influence of sudden passion or in a sudden fit of
5 rage, either of which was brought on by serious provocation
6 occasioned by the victim that was reasonably sufficient to
7 incite the defendant into using deadly force, then you must
8 find the defendant not guilty of murder and guilty of
9 voluntary manslaughter.

10 If you find defendant not guilty of aggravated
11 murder as charged in Count Two, you will not consider any
12 specification relative to Count Two.

13 If you find the defendant guilty of aggravated
14 murder as charged in the indictment, it is your duty to
15 deliberate further, this is aggravated murder on Count Two,
16 you must then decide additional factual questions, which we
17 call specifications, relative to this count. This count sets
18 forth two specifications. You will proceed to consider
19 whether each specification to this count has been proven
20 beyond a reasonable doubt if, and only if, you determine that
21 the defendant is guilty of this count. If your verdict is
22 not guilty as to this count, then you would not consider any
23 of the specification attached. If your verdict is guilty as

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1 to this count, the defendant may be found guilty or not
2 guilty of any, of either or both of the specifications.

3 Now, Specification One and Two charges the defendant
4 committed the aggravated murder while committing, attempting
5 to commit, or fleeing immediately after committing aggravated
6 burglary, and that the defendant was either the principal
7 offender in the commission of the aggravated murder or, if
8 not the principal offender, he committed the aggravated
9 murder with prior calculation and design.

10 All of the relevant terms have been previously
11 defined for you.

12 Before you can find the defendant guilty of
13 Specification Two to Count One you must find that the
14 defendant has proven beyond a reasonable doubt that the
15 defendant committed the aggravated murder while he was
16 committing, attempting to commit, or fleeing immediately
17 after committing aggravated burglary, and that the defendant
18 was either the principal offender in the commission of the
19 aggravated murder or, if not the principal offender, he
20 committed the aggravated murder with prior calculation and
21 design.

22 If you find that the State proved beyond a
23 reasonable doubt all of the essential elements of this

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1 specification, then your verdict must be guilty as to that
2 specification. If you find that the State failed to prove
3 beyond a reasonable doubt any one of the essential elements
4 of the specification, your verdict must be not guilty as to
5 that specification.

6 Specification Two as contained in Count Two charges
7 that the defendant committed the aggravated murder while
8 committing, attempting to commit, or fleeing immediately
9 after committing aggravated robbery, and that the defendant
10 was either the principal offender in the commission of the
11 aggravated murder or, if not the principal offender, he
12 committed the aggravated murder with prior calculation and
13 design. And again I've defined all those terms for you.

14 Before you can find the defendant guilty of
15 Specification Two attached to Count Two you must find that
16 the State has proven beyond a reasonable doubt that defendant
17 committed the aggravated murder while he was committing,
18 attempting to commit, or fleeing immediately after committing
19 aggravated robbery, and that the defendant was either the
20 principal offender in the commission of the aggravated murder
21 or, if not the principal offender, he committed the
22 aggravated murder with prior calculation and design.

23 The specifications set forth in the indictment each

1 constitute a separate and distinct matter. You must consider
2 each count and each specification and the evidence applicable
3 to each count and each specification separately, and you must
4 state your findings as to each count and each specification
5 uninfluenced by your verdict as to the other counts or
6 specifications, except that should you find the defendant not
7 guilty of a particular count, you will not consider the
8 specification or specifications for that count. The
9 defendant may be found guilty or not guilty of any of the
10 offenses or any of the specifications.

11 Now, folks, some of that sounds repetitious. It is
12 not actually repetitious when you read through this, and
13 you'll have an opportunity to do that. It's all logically
14 set forth.

15 Now, you may not discuss or consider the subject of
16 punishment. Your duty is confined to the determination of
17 whether the defendant is guilty or not guilty of the counts
18 and specifications I've read to you.

19 You must not be influenced by any consideration of
20 sympathy or prejudice. It is your duty to carefully weigh
21 the evidence, to decide all disputed questions of fact, to
22 apply the instructions of the Court to your findings, and to
23 render your verdicts accordingly. In fulfilling your duty

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1 your efforts must be, of course, to arrive at a just verdict,
2 so consider all the evidence and make your findings with
3 intelligence and impartiality and without bias, sympathy or
4 prejudice towards anybody involved in the trial so that both
5 of State of Ohio and Nathaniel E. Jackson will feel that
6 their case was fairly and impartially tried.

7 Now, if during the course of the trial the Court has
8 said or done anything that you consider an indication of the
9 Court's view on the facts in this case, you are instructed to
10 disregard that. That would be most improper for any judge to
11 try to send hidden signals to the jury. You folks have to
12 decide the facts. That's not my job.

13 Now, it may be difficult to remember all the
14 instructions that I've given you so to assist you you will
15 have a copy back there in the courtroom.

16 A couple other matters. Your initial conduct upon
17 entering the jury room is a matter of importance, I believe.
18 I would suggest it not to be wise to immediately express a
19 determination or to insist upon a certain verdict because if
20 you do so and you later becomes convinced that you were
21 initially wrong, your sense of pride may be aroused and you
22 may hesitate to change your position. You should consult
23 with each other, consider each other's views, and deliberate

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1 with the objective of reaching an agreement, but you must do
2 that only if you can do so, excuse me, without disturbing
3 your individual judgment. Each of you must decide this case
4 for yourself to begin with, but you should do so only after a
5 discussion and consideration of the opinion of the other
6 jurors. You should not hesitate to change an opinion if you
7 become convinced that you were initially wrong. But just as
8 important, no one should give up honest convictions just to
9 be congenial or just to go along with a verdict. You don't
10 go along with something you don't believe in, either way.

11 You will have with you in the jury room 10 verdict
12 forms. I am not going to read them in their entirety, I
13 think they explain themselves adequately, but all of them are
14 captioned with the case number and the name of this case.

15 MR. CONSOLDANE: Your Honor, I believe
16 there's more than 10, isn't there?

17 THE COURT: What?

18 MR. CONSOLDANE: I believe there's more
19 than 10, isn't there?

20 MR. MORROW: There's 14.

21 MR. CONSOLDANE: Fourteen.

22 THE COURT: Oh, we added the other ones,
23 that's right. Yeah. I'm sorry, 14. The first one is Count

1 One, indictment for aggravated murder, and it reads quite
2 simply, "We, the jury in this case, being duly impaneled and
3 sworn or affirmed, find the defendant Nathaniel E. Jackson,
4 ..." and there's a blank space. There's an asterisk beside
5 the name and down below there is an instruction, insert
6 whatever your decision is, guilty or not guilty, "... of
7 aggravated murder, did purposely cause the death of Robert
8 Fingerhut with prior calculation and design," on the date in
9 question and the manner and form as which he stands charged
10 in the indictment.

11 Now, you will notice that there is a signature line
12 for a date. The fore person that you pick should make sure
13 that each verdict form signed has the date on it. There are
14 then 12 signature lines. This being a criminal trial you
15 have to have the unanimous verdict on anything you decide to
16 have a proper finding. Let me put that another way. You
17 have to have the unanimous finding by 12 people in agreement
18 to have a guilty finding, okay?

19 The second verdict is on the specification attached
20 to Count One. The third form is Specification Two to the
21 first count of the indictment. And depending on where you
22 are at according to the instructions that I've given, you
23 will also have, if you reach that point, Count One, lesser

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1 included offense on murder.

2 The next is Count One again, lesser included offense

3 of murder, voluntary manslaughter. And you have, of course,

4 Count Two, which is the indictment for aggravated murder

5 also, the purposeful killing while committing a felony. You

6 have the next Specification One and Specification Two to that

7 Count Two. Again, the lesser included offense of murder and

8 the lesser included offense of murder, voluntary manslaughter

9 on Count Two.

10 Then you have Count Three, which is the indictment

11 for aggravated burglary, and these all have that blank line

12 where you fill in your verdict, the 12 signatures and the

13 date. And next is Specification One to the third count of

14 the indictment.

15 Next is Count Four, indictment for aggravated

16 robbery. Attached to that is a specification to the fourth

17 count of the indictment.

18 I'm getting Laurie in here. I just buzzed her.

19 Now, from this time on you will be in charge of the bailiff.

20 You will follow her instructions in every regard. She's

21 responsible for you folks. If you desire to communicate with

22 the Court for any reason you should do so in writing and only

23 after careful consideration of the language used so that the

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1 same does not necessarily disclose the status of your
2 deliberations and making sure that any inquiry is as clear
3 and unambiguous as you can make it. These requests should be
4 submitted in writing and signed by the fore person. You
5 should also put the date and the time of day when any
6 question is sent out. I need that form, too, to swear you
7 in.

8 THE BAILIFF: Oh, sorry.

9 THE COURT: Now, during all of the breaks
10 in your deliberations you will follow the instructions of the
11 bailiff. She is not permitted to discuss anything about the
12 case with you. Her sole function is see that you are
13 comfortable and that you have everything necessary to conduct
14 your deliberations. You should contact her when you want a
15 break for lunch or dinner or for the evening, whatever. I'll
16 get into that in a minute.

17 During any time that you are out of that jury room,
18 you are at lunch, some of you are going to be sharing rooms
19 over the course of however many evenings it takes you, you
20 still cannot talk about the case because it has to be a group
21 effort. All 12 have to be there at the same time. But even
22 if all 12 of you are sitting at a table outside of that one,
23 you can't talk about the case. It has to be done back there

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1 in the room.

2 You will have with you in the jury room the exhibits

3 and the verdict forms. You will also have with you in the

4 jury room a VCR and a TV and cassette player.

5 One of the first things you should do in getting

6 back to these instructions, they don't have it in, but you

7 should pick one of yourselves as a fore person. That person

8 has no greater or less authority than the rest of you.

9 Complete democracy back there. You all stand on even ground.

10 You should pick one person, and the most important thing I

11 think that that fore person can do, is to see that everybody

12 participates. Some of us by nature are reluctant to express

13 our opinion. Others of us, you can't shut us up. But the

14 fore person should be sure that everybody participates.

15 That's the value of having all 12 of you back there. As I

16 said before, you each bring your own life experience plus

17 your sense of community and we end up with a good result

18 almost invariably that way.

19 That fore person is also charged with, once a

20 verdict is returned, of bringing the verdict forms in with

21 them, be seated, and then at the appropriate time I will ask

22 that those be delivered to the bailiff. The fore person

23 should be the spokesman for the jury to the bailiff when at

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1 all possible. If any of you have any individual problems or
2 concerns dealing with your comfort or that, you can ask
3 Laurie individually of course, but whenever possible have one
4 spokesman for any communication with the Court.

5 Now, the evidence is before you. I've never seen a
6 case where evidence was supplemented after the jury has been
7 given the case. It's been done I guess. I've never seen it
8 done. I think you will have at your disposal complete recall
9 of all information that was given to you in the court that
10 isn't provided in the exhibits. If you have a question it
11 will be probably a question of law. Reduce it to writing,
12 sign by the fore person and date it. Sometimes I can answer
13 those after I've discussed whether it's proper with the
14 attorneys. If I'm permitted to do so, I will send a written
15 answer back to you. If I send an answer back which says
16 please continue with your deliberations, that means it's not
17 proper for me to answer that specific question, okay?

18 Until your verdict is announced in open court you
19 are again reminded you are not to disclose to anyone else the
20 status of your deliberations or the nature of your verdict or
21 discuss anything with anybody other than the other 11 people.

22 For the record, I am going to swear the bailiff in
23 to take charge of this jury.

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1 (Whereupon, the oath was administered to
2 the bailiff by the Court.)

3 THE COURT: Okay. Okay, folks, you are
4 from this point on until you --

5 MR. WATKINS: Your Honor, may we approach?

6 THE COURT: Yeah.

7 (Whereupon, a bench conference was held.)

8 THE COURT: Okay, let's get -- this is
9 some housekeeping we've been discussing here.

10 THE BAILIFF: I'm going to call and tell
11 them we're coming then.

12 THE COURT: Okay. Folks, I have not
13 formally sent you out as the jury yet at this point. There
14 is a correction that is going to be made on one of the
15 instructions. It's very short. We'll have to get that typed
16 so I will read that to you when you come back. Since you're
17 not formally the jury we're not supposed to pay for your
18 lunch or your dinner, supper, if you like, but we are going
19 to do it anyways, okay. We are going to send you out with
20 the bailiff and a couple deputies as we ordinarily do. And
21 just, it is most important that you remember the admonition.

22 We had a case here one time before where at -- the
23 jury was deliberating and during lunch or dinner a couple of

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1 the jurors sitting together were overheard discussing the
2 case. Not good. We might have to start the whole thing over
3 again and it's just a mess. That's the reason it is so
4 important. You folks have all been very reasonable and very
5 attentive, remarkably so, and please, just keep that going.
6 No discussion of anything.

7 Let me discuss a couple other things before I
8 release you here. When you come back and I read this slight
9 change, then you will be sent back to the jury room. You
10 take whatever time this evening you wish to take. When you
11 get over to those, that hotel room you won't have any TV,
12 radio or newspapers, so unless you brought -- or telephone.
13 Unless you happen to be very lucky and get a very interesting
14 roommate that you have a lot in common with, that can be a
15 boring evening, so you may want to go a little bit longer
16 here, I don't know.

17 THE BAILIFF: Judge, 20 minutes.

18 THE COURT: Okay.

19 THE BAILIFF: They won't be ready for 20
20 minutes.

21 THE COURT: That's good. You can get them
22 over there. You are going to the Saratoga? Yeah. They're
23 going to set a place up probably in the back there for you so

1 whatever, you can hang around for 20 minutes. Figure that
2 out with Laurie. They said they would be ready for you in 20
3 minutes and you all have a nice dinner. We'll see you back
4 here when you're done. Take about an hour or so, if you
5 will, okay?

6 THE BAILIFF: It's going to take us an
7 hour to get our food.

8 MR. WATKINS: You mean an hour and 20
9 minutes, Your Honor?

10 THE COURT: Well, whatever. When they get
11 back. We got to go through this other stuff so whenever they
12 get back, okay?

13 THE BAILIFF: It will take them that long
14 to get the food.

15 THE COURT: Yeah. Well, they're pretty
16 quick over there. Hey, you're the bailiff, get it
17 straightened out.

18 THE BAILIFF: It will be 20 till over
19 there.

20 THE COURT: What do you want them to do
21 here, meet out in the hall and be there and get --

22 THE BAILIFF: Well, they won't be ready
23 for us for about 20 minutes.

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1 THE COURT: Why don't you all go down and
2 have a seat in the jury room and then she'll come get you and
3 so you can walk over. It's just right across there.

4 (Whereupon, a dinner recess was taken.)

5 (Whereupon, Deputy Anthony Leshnack was
6 sworn in by the Court, after which a recess was taken.)

7 (Whereupon, the following proceedings
8 occurred outside the presence of the jury.)

9 THE COURT: For the record, it's come to
10 my attention upon conclusion of reading the instructions that
11 there are either -- there were a couple portions that were
12 either not correct or not complete and during the lunch hour
13 when the jury went out to lunch --

14 DEPUTY: Dinner.

15 THE COURT: -- the prospective -- or
16 during the lunch hour --

17 DEPUTY: Dinner. Dinner.

18 THE COURT: Summer. Supper.

19 MR. WATKINS: Dinner. Dinner.

20 THE COURT: Dinner. It's whether you're
21 fancy or more anglo-saxon, see. Supper, Maryann. Okay,
22 dinner. Mr. Morrow of the prosecutor's office has been kind
23 enough to type up a form which we've reviewed and it gives a

1 correct definition of deprive and explains the Specification
2 One to Counts One and Two.

THE COURT: MR. CONSOLDANE: You know, that's -- I
4 have really an objection. I'm not clear on what he's
5 changing.

6 (Whereupon, a discussion was had off the
7 record.)

8 THE COURT: Just so the record is clear, I
9 have not sent the jury out to deliberate yet. They went for
10 dinner. In the meantime we have corrected whatever mistake
11 was perceived to be present. Both sides have had a copy to
12 review and the Court is going to bring the jury back in and
13 instruct them as will appear on the record. I would order
14 that a copy of the original instruction as I read be put into
15 the permanent record and then a corrected copy go back to the
16 jury, okay? You want to get the jury up? You got something
17 else, Chuck?

18 MR. WATKINS: And before Tony objects, may
19 the record reflect that it was discovered through our reading
20 when the Court --

21 THE COURT: In the reading. We all missed
22 it, yeah.

23 MR. WATKINS: -- was going over the

1 charge. And under the law, after you read the charge both
2 sides have an opportunity --

3 THE COURT: Have an opportunity to
4 correct.

5 MR. WATKINS: -- to bring it to the
6 attention that there was a mistake and that is what we did.

7 THE COURT: And the Court agrees that
8 there was incomplete at least so.

9 MR. CONSOLDANE: Well, Your Honor, I would
10 object to you reading that and I have got a couple reasons.

11 First of all, you know, I have long objected to the
12 prosecutor preparing the jury charge, you know. This puts
13 the defense at a great disadvantage. They prepare it and
14 they prepared it wrong, you know. That was their fault with
15 it. And on one charge that I can see where they want to
16 correct that, you know, I can understand that that may be
17 possible, but when we left here at the lunch time there was
18 never anything mentioned about changing the or adding to the
19 definition of deprive. I knew nothing about that until just
20 30 seconds ago. I tell you what, I would like, I would like
21 some time to look at that and see if that is correct. And I
22 would object to doing that anyways at this particular time --

23 THE COURT: Would you rather have,

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1 Mr. Consoldane, an incorrect jury instruction?

2 MR. CONSOLDANE: Well, Your Honor, we have

VE. 3 FOR ONE two things. We have one section which they mentioned before

4 we broke for lunch that was incorrect and I had a chance to

5 look at that and I understand that and I can see where the

6 Court might want to correct that. That was caught right away

7 when that was said. Nothing was ever mentioned about adding

8 on to the information about the definition of deprive and

9 that was just thrown at me, you know, five minutes ago and I

10 think that that's not necessary. I think that the definition

11 of deprive that the prosecutor has in there is enough. If

12 that's not, then I would like at least this evening to go

13 over and look and see, you know, what other mistakes, number

14 one, what other mistakes they might have made, and number

15 two, whether that is a correct definition of deprive that is

16 going to fit the facts of this case, and, three, whether we

17 might want to request another ancillary instruction. I think

18 for them to go and do that at this time is wrong.

19 And, also, I think if you are going to correct, make

20 that many corrections in the jury instructions, I think that

21 they should be read again in whole rather than just piecemeal

22 giving them directions.

23 MR. WATKINS: Your Honor, can we respond?

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1 THE COURT: Is this right out of OJI or
2 what?

3 MR. CONSOLDANE: But, Your Honor, what happens is
4 in OJI they say deprive is refer to R.C. 2913 -- deprive,
5 they refer you to Revised Code Section 2913.01(C). Initial
6 instructions as I included has only the definitions for
7 (C)(1) and (C)(2). The addition includes the (C)(3)
8 provision. Under 2913.01(C) there are three subsections and
9 I left, I left out the three provision which begins with
10 "accept, use or appropriate money, property or services..."
11 through the remainder, so I just added that to make the
12 definition of deprive complete.

13 THE COURT: That's directly from the
14 statute.

15 MR. MORROW: That is correct, Your Honor.

16 MR. CONSOLDANE: But to do that, Your
17 Honor, out of context, it's like you're telling the jury
18 they, you know, that they have to find this. I think it is
19 unfair --

20 THE COURT: No. That's the argument
21 that's already raised. Whenever one side convinces the Court
22 to make, to correct something, then the other side always
23 says that's unfair. I don't believe it is unfair. I think

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1 it is fair to make sure that the jury doesn't have an
2 incorrect definition of one sort or another.

3 Well, Your Honor, MR. CONSOLDANE: But, Your Honor, if they
4 left it out why should I be punished by it?

5 THE COURT: They didn't leave it out.

6 MR. MORROW: It's not a matter of
7 punishment.

8 THE COURT: This has -- we all went over
9 these instructions. This is a mistake that I would submit
10 you are as guilty of as we are or I am or they are.

11 MR. CONSOLDANE: No. I was happy with
12 that definition. I was satisfied with that definition. It
13 doesn't need any more to it. What is there is enough.

14 THE COURT: There was a -- it doesn't
15 conform with the -- you know, why not put the second half in
16 and not the whole thing, leave the first half out?

17 MR. CONSOLDANE: We do that a lot. We do
18 that a lot of times, they don't put the whole OJI in, only
19 what sections apply. I read it, I saw it, I thought it was
20 fine, and I didn't object to it, but I object to amending it
21 now.

22 MR. MORROW: The Court's responsibility is
23 to instruct on the full course of the law, and if deprive is

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1 defined in three subsections and there is an omission, an
2 omission, then it is --

3 asking you

THE COURT: Well, I don't know how you can

4 go wrong by quoting what the law is and that's what this

5 does, so your objection is noted and it's overruled. Let's

6 bring the jury in here and go on with this.

7

MR. CONSOLDANE: Your Honor, I would

8 request that that paper that they want you to read, that I

9 would like to have it marked as an exhibit.

10

(Whereupon, Court's Exhibits 4 and 5 were

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marked for identification, after which the jury was seated in

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the jury box and the following proceedings commenced.)

13

THE COURT: I trust you all ate well.

14

Okay. Tony, you are waiving Jim's presence, is that correct?

15

MR. CONSOLDANE: Yes.

16

THE COURT: Okay. Thank you. Ladies and

17

gentlemen, this Court has previously instructed you

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concerning a number of terms. It's come to my attention, I

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have become aware that a couple of those were either

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incomplete or incorrect. I think it's more a question of

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incompleteness. But, in any event, I am going to read

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through three different short paragraphs here and the

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instruction that you will have will have these corrections in

1 there rather than what I read to you. So what I read in
2 regard to these items you should set aside and follow the
3 instructions I'm now giving you.

4 Deprive means to withhold property of another
5 permanently, or for such a period as to appropriate a
6 substantial portion of its value or use, or to dispose of
7 property as to make it unlikely that the owner will recover
8 it; or accept, use or appropriate money, property or
9 services, with purpose not to give proper consideration in
10 return for the money, property or services, and without
11 reasonable justification for not giving proper consideration.

12 Now, for purposes of Specification One to Counts One
13 and Two, while committing or attempting to commit means that
14 the aggravated burglary must occur as part of acts leading up
15 to, or occurring during, or immediately after the murder set
16 out in this charge and that the murder was directly
17 associated with the aggravated burglary.

18 For purposes of Specification Two to Counts One and
19 Two, while committing or attempting to commit means that the
20 aggravated robbery must occur as part of acts leading up to,
21 or occurring during or immediately after the murder set out
22 in this charge and that murder was directly associated with
23 the aggravated robbery.

1 You are to disregard any instructions I gave
2 previously that are contrary to this and follow this
3 instruction which, as I said, you will have in the charge to
4 the jury with you.

5 Ladies and gentlemen, are the 12 members of the jury
6 ready to begin deliberations? Are there any problems?

7 (Whereupon, no juror responded in the
8 affirmative.)

9 THE COURT: Okay. I am at this time then
10 putting you in the care and custody of Laurie. And, as I
11 said, you should pick a foreman. I went through all of that.
12 You folks tell us when you wish to break for the evening,
13 okay?

14 Now, to the alternates, you got a whole pot of
15 coffee down there. You sit down there by yourselves. Please
16 stay together, though. And the same admonition, of course,
17 you're not to discuss anything about this case, because if
18 you should be called upon, hopefully that won't occur, but if
19 you should have to sit on the jury we don't want that messed
20 up, okay? So you all behave yourselves down there.

21 You folks let us know when you are ready to go.
22 When you are ready to go over then all of you will go over
23 for the evening, okay? Very good. Laurie, you have

1 everything. The exhibits are back there.

2 THE BAILIFF: Is that for the jury?

3 THE COURT: Let's see here which one we
4 got. This is the new one here. Have him check that, but
5 that's the new one. I'll have you mark this one when you get
6 time as the one that was incorrect. Okay, folks, please be
7 kind enough to go with Laurie then.

8 (Whereupon, the jury began their
9 deliberations at 7:35 p.m.)

10 (Whereupon, Court's Exhibit No. 6 was
11 marked for identification.)

12 (Whereupon, the jury was seated in the
13 jury box at 11:15 p.m., the defendant being present, and the
14 following proceedings commenced.)

15 THE COURT: I understand you all wish to
16 pack it in for tonight. I will again remind you you are not
17 to watch any TV, read anything, to have any discussion among
18 yourselves. And what time will they be up for breakfast in
19 the morning? You will take care of that. Get them back over
20 here by 8:30 or 9:00 o'clock in the morning. You will have
21 all day to continue on your deliberations. Thank you. You
22 all have a nice evening.

23 (Whereupon, Court was recessed at

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1 (11:22 p.m.)

2 (THURSDAY, NOVEMBER 7, 2002)

3 (Whereupon, the jury resumed deliberations
4 at 9:30 a.m.)

5 (Whereupon, the jury and alternates were
6 seated in the jury box at 1:00 a.m, with the defendant
7 present, and the following proceedings commenced.)

8 THE COURT: Ladies and gentlemen of the
9 jury, you sure have had a full day. It is my understanding
10 you wish to call it a day. Laurie and these deputies will
11 escort you over to the hotel again. Same instruction. I
12 know you are getting tired of hearing it. You are not to
13 take advantage of any TV presentation, read any newspaper or
14 have any individual discussion among yourselves over the
15 course of the evening. I have been requested by counsel to
16 ask if you wish to start at 9:00 in the morning or perhaps a
17 little bit later.

18 (Whereupon, the jury agreed on 9:00 a.m as
19 the time to resume deliberations.)

20 THE COURT: I trust you will have a
21 restful evening and we will see you back here in the morning.
22 You are not to discuss anything over the evening.

23 There is no need for us all to meet in the morning.

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1 You will all continue your deliberations. We just ask that
 2 when you get here -- you will all be pretty much in one
 3 group. You might be split up among the three people that
 4 have charge of you, but none of you should go back into the
 5 jury room by yourselves. Wait until you are all together and
 6 then go back together.

7 (Whereupon, Court was recessed at

8 1:03 a.m.)

9 (FRIDAY, NOVEMBER 8, 2002)

10 (Whereupon, the jury resumed their
 11 deliberations at 9:25 a.m.)

12 (Whereupon, the following proceedings
 13 commenced in chambers at 4:55 p.m. outside the hearing of the
 14 jury, Attorney James Lewis not being present.)

15 THE COURT: We are in chambers out of the
 16 presence of hearing -- you waive the presence of the
 17 defendant? He is being brought over?

18 MR. CONSOLDANE: Yes, I waive his presence
 19 and also the presence of my co-counsel.

20 THE COURT: Thank you. It is 10 to 5:00
 21 and the jury has sent out a request. Can I see what the
 22 request is?

23 MR. CONSOLDANE: Okay.

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1 THE COURT: Okay. This, I will have this
2 marked as an exhibit, whatever the next number, I think it is
3 like 6, and it reads, message from the jury to the Court, "We
4 need another copy of Specification 1 to the fourth count of
5 the indictment." In reviewing that we find that there is an
6 inclusion under the double asterisk which reads on the one
7 that they had taken with them, which I assume they have
8 caught the mistake, it says, "To be completed if, and only
9 if, your finding on the charge of Count Two, kidnapping or
10 lesser included offense of abduction, is guilty."

11 After consultation with both sides here we've made
12 an amended on that double asterisk to read "To be completed
13 if, and only if, your finding on the charge on Count Four,
14 aggravated robbery, is guilty." That was done in error and
15 this correction will be sent back with them. Are there any
16 objections? Is there anything that anyone wishes to place on
17 the record?

18 MR. CONSOLDANE: Dennis?

19 MR. WATKINS: No.

20 MR. CONSOLDANE: Okay. I have looked it
21 over and I believe that that is correct what you have stated.

22 THE COURT: Okay. I will direct the
23 bailiff then to deliver this to the jury.

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1 MR. CONSOLDANE: There is --

2 THE COURT: Just need the one copy to go
3 back to them. ~~They have it.~~

4 MR. CONSOLDANE: There is one other thing
5 just while we have the court reporter here, and it is the
6 first time the court reporter has been available since last
7 night, but as we were leaving last night I was walking down
8 the steps and got down to the first floor and they had all
9 the jurors assembled, ready to take them to the hotel, and
10 standing in the middle of them was two of the ladies from
11 Dennis's office that's on the second floor. Now, you know
12 I've been harping about this and bitching about it since this
13 trial has started.

14 MR. WATKINS: Let's get that back to the
15 jury.

16 THE BAILIFF: If you want to talk to Jim,
17 I don't know, Jim is on the phone.

18 MR. CONSOLDANE: Just let me finish this
19 and I will talk to him. You know that I don't believe that
20 that is, you know, is proper for them to be mingling with the
21 jury. I've been complaining about this and bringing it to
22 the Court's attention since this trial started. They have
23 the jury room right across from that room, and for what

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1 reason were these people here last night at 1:30 in the
2 morning? There are no victim's relatives here, you know,
3 they haven't been in court for the last several days. For
4 what reason would they be standing around with the jury at
5 1:30 in the morning if only to try and influence them in some
6 way? I don't know of any reason. I didn't hear of anything
7 that they said or done, but it just doesn't look right.

8 THE COURT: Prosecution or the State.

9 MR. WATKINS: Your Honor, I think this is
10 a continuing effort to misrepresent the plain fact of the
11 matter that, first off, that these two women -- and would you
12 identify who they are?

13 MR. CONSOLDANE: I don't know them by
14 names. I just know that they, that they come in and out of
15 your office. And for what reason were they here at 1:30 in
16 the morning?

17 MR. WATKINS: Well, first off, you don't
18 know who they are, correct, Tony?

19 MR. CONSOLDANE: I just know they work in
20 the office.

21 MR. WATKINS: Are you saying they are
22 employees of the office?

23 MR. CONSOLDANE: Dennis, I don't know who

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1 you employ or who you don't employ. I know they got keys to
2 your office and they go in and out of the office. I would
3 assume they have some type of relationship.

4 MR. WATKINS: They don't have keys and I
5 know who they are, I believe, and it's Becky Peece and
6 another woman by the name of Joyce -- do you know her last
7 name?

8 MR. MORROW: I don't even know her last
9 name? Well, they have names like

10 MR. WATKINS: They are involved with the
11 victim/witness program. They are citizens, they are not
12 employees of our office.

13 THE COURT: They contribute their time?

14 MR. WATKINS: Right, and they simply have
15 an interest to watch the trial and they were in the hallway
16 like we were in the hallway. And to say that when we are
17 leaving the court, whether it's Attorney Consoldane or
18 Attorney Morrow or whether or not it's at any point in any
19 floor of the courthouse, everybody has a right, and they are
20 citizens, to be there. And again he indicates that somehow
21 the fact that they are here and they have an interest in a
22 trial where somebody was killed, that everybody has a right,
23 including the defendant's family, whoever wants to be in this

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1 public courthouse has a right to be in the public courthouse,
2 and they have a right to be in the halls. If he has specific
3 facts, and he just mentioned they are just there. And the
4 fact is the jury wouldn't even know who they are.

5 MR. CONSOLDANE: Your Honor, maybe I'm
6 getting a bit paranoid. They are under Dennis's control.

7 MR. WATKINS: No, they aren't under my
8 control.

9 MR. CONSOLDANE: Well, they have access to
10 your office. They are in and out of your office. They camp
11 in your office all the time on the second floor right across
12 from where the jury is.

13 MR. WATKINS: That's the victim/witness
14 office.

15 MR. CONSOLDANE: Well, that's where they
16 are. That's your office. Isn't that where you hold grand
17 jury?

18 MR. WATKINS: That is also the Court's
19 office. The grand jury is part of the function of the Court.
20 That's what we do.

21 MR. CONSOLDANE: Well, it just for them --
22 it just doesn't look right. And I don't know why, what
23 business they had to be here at 1:30 in the morning.

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1 MR. MORROW: Just like it didn't look
2 right last night with you walking out right behind all the
3 jurors, if you want to make allegations of misconduct. That
4 is the exact same thing. You walked out right behind the
5 jurors as they were walking out the door.

6 MR. CONSOLDANE: Not behind them. After
7 they left I walked out.

8 MR. MORROW: Absolutely not. Dennis and I
9 stood on the step and watched you follow them right out the
10 door.

11 THE COURT: Let me get my two cents into
12 this, if I may. This has been a continuing argument being
13 made by the defense during this trial and I think it's also
14 made by the defense in other trials similar to this. I had
15 occasion last evening when leaving, which was probably 10
16 minutes after the jury had left the room here, walking down
17 the steps with Maryann, the reporter. Laurie was standing
18 out in the hall before going out giving some directions to
19 the jurors. The two people that counsel refers to, who have
20 some association with the victim/witness group, were standing
21 but they were standing by the steps on the right-hand side.
22 I came down the left. They weren't in with the jury. I
23 didn't see that.

1 MR. CONSOLDANE: Okay. Well, close
2 proximity.

3 THE COURT: And there's another factor I
4 think that is of some importance, and that is I don't know
5 how the jury would have any idea who these people are because
6 they haven't appeared in this trial, unless they would know
7 them from prior contact or something. But your concern about
8 them even being here is something that you are noting
9 primarily, I don't think you are saying that there was any
10 conversations or anything untoward of that nature which you
11 observed.

12 MR. CONSOLDANE: No, I didn't.

13 THE COURT: Just that they were there,
14 right?

15 MR. CONSOLDANE: Right. I didn't see them
16 say anything, but I guess it's just that they, they come in
17 and out of the office right across from where the jury goes
18 and the jury sees them in and out of that office and, you
19 know, I don't know what they, you know, I really don't know
20 what they perceive it to be. But, you know, and I can
21 understand their need to be here if they've got relatives of
22 the victim to console, maybe that, but at 1:30 in the morning
23 while the jury is out, nothing is going on in court.

1 THE COURT: Well, I can pass this on. I
2 believe that Miriam was going to stay herself and she told me
3 that the reason -- and I approached and talked to Miriam, the
4 head of the victims of crime. I said to her, "What are you
5 doing here," and she said that I promised to notify --

6 MR. WATKINS: The victim.

7 THE COURT: -- the victim's family --

8 MR. WATKINS: That's correct.

9 THE COURT: -- when the jury came back.

10 MR. WATKINS: And that's what they do.

11 THE COURT: And one of the girls told me
12 that these two ladies told Miriam, "Go on home, we'll stay."

13 MR. WATKINS: Ike is in the hospital.

14 THE COURT: What's that?

15 MR. WATKINS: Miriam's husband went in the
16 hospital last early evening around 5:00 o'clock.

17 THE COURT: Well, that might have been --
18 I know Miriam was intending on staying.

19 MR. WATKINS: And that's the role that
20 they play, to make phone calls if there were a verdict.

21 THE COURT: In any event, anybody else
22 have anything to add? That is the situation, James. Are you
23 still there? Jim Lewis is on speaker phone here and he's

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1 heard this entire conversation. He had called in to talk to
2 Tony. Do you wish to talk privately to Tony, Jim?

3 MR. LEWIS BY SPEAKER PHONE: Yeah. The
4 only thing is I would -- you can put this on the record. My
5 view of the whole thing is that victim/witness, they know who
6 the jurors are and I think they should just stay away from
7 them. I think they should just give them a clear berth and
8 they shouldn't be anywhere around them really. They know who
9 they are, the victim/witness people come in and know who the
10 jurors are, and they can see them in the group, and
11 everything else, and should stay clear. I really believe we
12 try to stay clear of them.

13 MR. WATKINS: And they do.

14 MR. LEWIS: And I just think they ought to
15 do that. So that's enough on the record for me.

16 THE COURT: It is a valid point and I'm
17 sure that they should know that. And I have not again had
18 anything brought to my attention that's contrary to that
19 except this particular incident. Okay. Tony, you want to
20 talk to Jimmy?

21 MR. CONSOLDANE: Yeah. Can I take him out
22 here?

23 (Whereupon, the proceedings in chambers

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1 were concluded; Court's Exhibit 6, the jury question, was
2 marked for identification; and a recess was taken while the
3 jury continued their deliberations.)

4 VERDICT

5 (Whereupon, the jury was seated in the
6 jury box and the following proceedings commenced at
7 6:09 p.m. as follows.)

8 THE COURT: Please be seated. Thank you.
9 Ladies and gentlemen of the jury, have you rendered a verdict
10 in this matter?

11 (Whereupon, the jury answered in the
12 affirmative.)

13 THE COURT: Okay. Would the fore person
14 please deliver that to the bailiff?

15 Okay. The verdict delivered to me from this jury
16 reads on Count One, Indictment for Aggravated Murder, "We,
17 the jury in this case, duly impaneled and sworn or affirmed,
18 find the Defendant, NATHANIEL E. JACKSON, guilty of
19 Aggravated Murder (did purposely cause the death of Robert
20 Fingerhut with prior calculation and design) on December 11,
21 2001, in the manner and form as he stands charged in Count
22 One of the indictment." That is dated this date and there
23 are 12 signatures affixed thereto.

1 On the Specification One to the First Count of the
2 Indictment it reads, "We, the jury in this case, duly
3 impaneled and sworn or affirmed, find and specify by proof
4 beyond a reasonable doubt that the Defendant, NATHANIEL E.
5 JACKSON, is guilty of committing the offense of Aggravated
6 Murder while he was committing, attempting to commit, or
7 fleeing immediately after committing Aggravated Burglary and
8 that the said NATHANIEL E. JACKSON was the principal offender
9 in the commission of the Aggravated Murder, or committed the
10 Aggravated Murder with prior calculation and design." Dated
11 this date and signed by all 12 members of the jury.

12 On Specification Two to the First Count of the
13 Indictment it reads, "We, the jury in this case, duly
14 impaneled and sworn or affirmed, find and specify by proof
15 beyond a reasonable doubt that the Defendant, NATHANIEL E.
16 JACKSON, is guilty of committing the offense of Aggravated
17 Murder while he was committing, attempting to commit, or
18 fleeing immediately after committing Aggravated Robbery and
19 that the said NATHANIEL E. JACKSON was the principal offender
20 in the commission of the Aggravated Murder, or committed the
21 Aggravated Murder with prior calculation and design. Again
22 dated this date and signed by all 12 members of the jury.

23 On Court Two, Indictment for Aggravated Murder, "We,

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1 the jury in this case, duly impaneled and sworn or affirmed,
2 find the Defendant, NATHANIEL E. JACKSON, guilty of
3 Aggravated Murder (did purposely cause the death of Robert
4 Fingerhut, while committing, attempting to commit, or fleeing
5 immediately after committing Aggravated Burglary and/or
6 Aggravated Robbery on December 11th, 2001, in the manner and
7 form as he stands charged in Count Two of the indictment."
8 Dated this date and signed by all 12 members of the jury.

9 On Specification One to the Second Count of the
10 Indictment, "We, the jury in the case, duly impaneled and
11 sworn or affirmed, find and specify by proof beyond a
12 reasonable doubt that the Defendant, NATHANIEL E. JACKSON, is
13 guilty of committing the offense of Aggravated Murder while
14 he was committing, attempting to commit, or fleeing
15 immediately after committing Aggravated Burglary and that the
16 said NATHANIEL E. JACKSON was the principal offender in the
17 commission of the Aggravated Murder, or committed the
18 Aggravated Murder with prior calculation and design." Dated
19 this date and signed by all 12 members of the jury.

20 On Specification Two to the Second Count of the
21 Indictment, "We, the jury in this case, duly impaneled and
22 sworn or affirmed, find and specify by proof beyond a
23 reasonable doubt that the Defendant, NATHANIEL E. JACKSON, is

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1 guilty of committing the offense of Aggravated Murder while
2 he was committing, attempting to commit, or fleeing
3 immediately after committing Aggravated Robbery and that the
4 said NATHANIEL E. JACKSON was the principal offender in the
5 commission of the Aggravated Murder, or committed the
6 Aggravated Murder with prior calculation and design." Dated
7 this date, excuse me, it's signed by all 12 members of the
8 jury.
9 On Count Three of the Indictment for Aggravated
10 Burglary, "We, the jury in this case, duly impaneled and
11 sworn or affirmed, find the Defendant, NATHANIEL E. JACKSON,
12 guilt of Aggravated Burglary on December 11, 2001, in the
13 manner and form as he stands charged in Count Three of the
14 Indictment." That is dated this date and signed by all 12
15 members of the jury.

16 Specification attached to the Third Count of the
17 Indictment, "We, the jury in this case, duly impaneled and
18 sworn or affirmed, find and specify that the Defendant,
19 NATHANIEL E. JACKSON, did have a firearm on or about the
20 offender's person or under the person's control while
21 committing the offense and displayed the firearm, brandished
22 the firearm, indicated that the offender possessed the
23 firearm, or used it to commit the offense of Aggravated

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1 "Burglary." Signed November 8th, 2002, and signed by all 12
2 members of the jury.

3 "Count Four, Indictment for Aggravated Robbery, "We,
4 the jury in this case, duly impaneled and sworn or affirmed,
5 find the Defendant, NATHANIEL E. JACKSON, guilty of
6 Aggravated Robbery on December 11th, 2001, in the manner and
7 form as he stands charged in Count Four of the indictment."
8 That is also signed this date by all 12 members of the jury.

9 "Specification One to the Fourth Count of the
10 Indictment, "We, the jury in this case, duly impaneled and
11 sworn or affirmed, find and specify that the Defendant,
12 NATHANIEL E. JACKSON, did have a firearm on or about the
13 offender's person's control while committing the offense and
14 displayed the firearm, brandished the firearm, indicated that
15 the offender possessed the firearm, or used it to commit the
16 offense of Aggravated Robbery." Dated today and signed by
17 all 12 members of the jury.

18 The lesser counts have not been completed, which is
19 proper with the verdict rendered.

20 Ladies and gentlemen of the jury, have I properly
21 read the verdict as rendered by you?

22 (Whereupon, the jury answered in the
23 affirmative.)

1 THE COURT: Okay. Thank you. Does the
2 State wish to poll the jury?

3 MR. WATKINS: No, Your Honor.

4 THE COURT: Does the defense?

5 MR. CONSOLDANE: No.

6 THE COURT: Okay. Very good.

7 MR. CONSOLDANE: I would like to inspect
8 the jury verdicts.

9 THE COURT: Yeah. You want to look at
10 that before we proceed, look these over? Ladies and
11 gentlemen of the jury, because of the form of the verdict
12 that means that I must have you come back for a separate
13 hearing. I've explained that all to you before and will
14 explain further once we commence that hearing. I am going to
15 ask that you return at 12:00 o'clock this coming Thursday.
16 It's agreed, right?

17 MR. WATKINS: That's correct, Your Honor.

18 MR. CONSOLDANE: Yeah.

19 THE COURT: At that time you need not
20 bring anything for overnight, but Friday when you return you
21 will want to bring those items with you as you did recently
22 because if the matter is not concluded by way of your
23 decision on Friday then you, of course, will have to be

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1 sequestered that evening, so make preparations according to
2 that.

3 The alternates have been most patient, and I know
4 that's very boring sitting down there not being able to watch
5 TV. You probably all know each other very well by now. I
6 would ask that you return at the same time. Well, I will
7 give you further instructions when you come back in on
8 Thursday.

9 I believe you folks have labored long and diligently in this
10 matter. The case is not over yet. It is most important --
11 you are going to be free to go home, of course, now. It is
12 still very important that you observe the admonition not to
13 discuss anything. You see the press here. There will be
14 things in the newspaper, there will be things on TV. Please
15 do not watch any of that or read anything about this case.

16 When you return the hearing will probably -- the
17 evidence that remains to be put before you will be much more
18 brief than what you listened to on the main part of the case,
19 but until you have that information and make your
20 determination in the second phase the case is not over.

21 We're just taking a couple days off here, so please don't
22 talk with anyone, let anyone talk with you.

23 Now, I know that anybody who is aware that you were

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1 on this jury, particularly after they read what the verdict
2 has been, you're going to have people come up to you and say,
3 "Oh, boy, tell me about it," and some of you will probably
4 want to tell them about it. You can't. Please.

5 Okay. You all have a nice weekend. We'll see you
6 back here Thursday at noon and we will finish the second
7 phase. Just a second. Oh, yeah, yeah, that's another thing.
8 Let me explain this to you.

9 Some of you asked, I believe some of you who worked
10 at different restaurants, whether you could go to work and
11 everybody agreed that was okay at that period. I'm going to
12 direct you to not return to work during this period of time
13 because you will be faced with something that's going to be
14 almost impossible. You won't get any work done anyways,
15 people will be asking you questions, so please stay home.
16 Back here Thursday. When we're done then you will be free to
17 talk about whatever with whomever, but until that time you
18 just cannot do it, okay? Very good. Thank you all very
19 much.

20 MR. WATKINS: Your Honor, may we approach?

21 (Whereupon, a bench conference was held.)

22 THE COURT: You folks gets your things and
23 we'll get you out of here before anybody else leaves, okay?

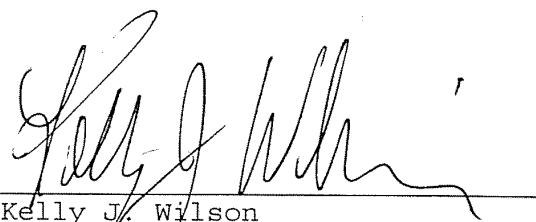
1 Thank you. I am going to ask everybody in here to remain
2 until the jury has left.

3 (Whereupon, the jury was excused at
4 6:18 p.m. and Court was recessed for the evening.)

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9 REPORTER'S CERTIFICATE

10
11 This is to certify the foregoing represents a true and
12 correct copy of the proceedings had in the aforementioned
13 cause as reflected by the stenotype notes taken by me on the
14 same.

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Kelly J. Wilson
Official Court Reporter